Southwick Group d/b/a Toyota of Berkeley *and* Automobile Salesmens Union Local 1095, United Food and Commercial Workers Union, AFL–CIO *and* United Food and Commercial Workers Union, Local 1179, Automobile Sales Division. Cases 32–CA–6505, 32–CA–7233, 32–CA–7846, 32–CA–9362, and 32–CA–10320

March 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 22, 1990, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel also filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order.

1. The judge found, and we agree, that Local 1179 properly succeeded to Local 1095's October 17, 1988 certification by the Board, as the bargaining representative of the Respondent's motor vehicle salespersons, when 1095 merged with 1179 and became a part of that local, as a separate and semiautonomous division, the Automobile Sales Division, i.e., a continuity of representation was maintained after the merger. See generally, e.g., *Seattle-First National Bank*, 290 NLRB 571 (1988). We find it necessary, however, to clarify certain of the statements he made in reaching that finding.

In his discussion entitled, ''The Issue of Continuity,'' the judge states that one of the conditions of the merger of Local 1095 and Local 1179 was that the geographic jurisdiction and trade jurisdiction of the newly created Automobile Sales Division in Local 1179 be identical to predecessor Local 1095's geographic and trade jurisdiction. In the next paragraph, however, he states that the Automobile Sales Division of Local 1179 has a much larger geographic and a much narrower trade jurisdiction than Local 1095's geographic and trade jurisdiction. It is obvious from subsequent discussion in the judge's decision that the reference to Local 1095 in the second statement was mistaken. The judge meant to compare the jurisdiction of the Automobile Sales Division in Local 1179 to the jurisdiction of the remainder of Local 1179. In this regard, the geographic jurisdiction of the Automobile Sales Division was much broader, but its craft jurisdiction was much narrower, than the remainder of Local 1179. The judge's first statement was correct.

Later in the same discussion, the judge states that in determining that there was a substantial degree of continuity between the premerger Local 1095 and the postmerger Local 1179, ''it is also significant that after the merger, Local 1095 did not surrender control over its representation and collective-bargaining functions.'' The Respondent has excepted to this conclusion. We find that in the discussion that followed this statement, the judge explained its meaning, i.e., that all the important representation and collective-bargaining functions performed for its members by Local 1095 when it existed as a separate local continued to be performed for those same individuals by the newly created Automobile Sales Division of Local 1179. In other words, virtually all the benefits and privileges which Local 1095 members had enjoyed were continued after the merger within that separate and semiautonomous division.[2]

2. Until December 13, 1983, the Respondent recognized Local 1095, the Union, as the exclusive bargaining representative of its full-time and regular part-time salespersons. On that date the Respondent lawfully withdrew recognition from the Union, after the filing, on the same day, of a decertification petition supported by a majority of the unit employees. Six days later, on December 19, the Respondent filed an RM petition in the same unit. Between the representation election that followed on February 22, 1984, and the Board's certification of the Union on October 17, 1988, the Respondent made certain unilateral changes in its salespersons' terms and conditions of employment. The judge found that the Respondent acted at its peril in making these changes and thus violated Section 8(a)(5) and (1) of the Act. He concluded that, in the absence of compelling economic considerations, unilateral changes made by an employer pending determination of objections and challenges have the effect of bypassing and undermining the union's status as the employees'

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Neither of the above clarifications of the judge's decision changes the result we reach in this case.

ees' statutory representative in the event it is ultimately certified.[3] In support of this conclusion, the judge cited *Mike O'Connor Chevrolet*.[4]

It is clear that any unilateral changes the Respondent chose to make from the time it lawfully withdrew recognition until the election would not have violated Section 8(a)(5) of the Act because it was under no duty to bargain with the Union about such changes during that limited period. However, the unilateral changes made after the election were unlawful. In this regard, we note that the Respondent lawfully withdrew recognition from the Union on December 13, 1983, and thus the Union participated as a nonincumbent in the election of February 22, 1984. The election ultimately resulted in the certification of the Union in 1988. The unilateral changes were made between the time of the election and the time of the certification. In *Mike O'Connor Chevrolet*, the Board held that, in such circumstance, the unilateral changes are unlawful under Section 8(a)(5). That is, the employer who wishes to make unilateral changes runs the risk that the union will be deemed the winner of the election and the changes will be deemed unlawful. Hence, under *Mike O'Connor*, the changes here were unlawful.

The Respondent argues that the instant case is governed by *W. A. Krueger Co.*,[5] rather than by *Mike O'Connor*. *W. A. Krueger* involved a decertification petition. That is, the union was the incumbent representative at the time of the election, and was ultimately deemed to be the loser of the election. The Board held that unilateral changes made between the election and the certification of results were unlawful.[6] In essence, under *Krueger* an employer cannot ignore the incumbent union, by making unilateral changes, until after the union is declared the loser of the election. The Respondent, however, gleans from *Krueger* the notion that the status quo ante the election (in that case, incumbency of the union) shall prevail until the election results are certified. The Respondent then argues that this principle applies to this case, i.e., the status quo ante the election (nonincumbency of the union) prevails until the election results are certified.

In our view, the instant case is governed by *Mike O'Connor*, rather than by *Krueger*. The substantive distinction between these two cases is that *Mike O'Connor* involved a nonincumbent union competing for certification, and *Krueger* involved an incumbent union whose decertification was sought. The instant case involves the former fact pattern and therefore falls within the *Mike O'Connor* rule. The fact that one of the petitions was a decertification petition cannot change *the substance* of what was involved here, a nonincumbent union competing for certification.

Accordingly, under *Mike O'Connor*, because the Union was ultimately certified, the Respondent was not privileged to make unilateral changes during the period between the election and the certification. With the exception discussed below, all such changes were violative of Section 8(a)(5).[7]

3. The Respondent excepts to the judge's finding that it violated the Act in ways not alleged in the complaint. The judge found that the Respondent's unilateral conduct of requiring its sales employees to contribute $20 per month into an insurance fund, although not alleged as an unfair labor practice, raised an issue closely related to other complaint allegations, and was fully and fairly litigated. Accordingly, he found that this conduct violated Section 8(a)(5) and (1) of the Act. (See fn. 16 of the judge's decision.) We disagree with the judge and find that this issue was not fully and fairly litigated, nor was the Respondent on notice that it would be found to have violated the Act by engaging in such conduct. The General Counsel could at any time have amended the complaint to allege the $20 monthly contribution as a violation (indeed she amended the complaint in other ways during the hearing), but she failed to do so. The amount of discussion devoted to this issue in the transcript is minimal, and even though it may be closely related to other complaint allegations, we find that there was no airing of this issue sufficient to conclude that it was fully and fairly litigated.

The other instance in which the judge found a violation not supported by an underlying complaint allegation was the Respondent's unilateral institution of a policy in January 1985 that required sales employees to pay the Respondent for any damages, up to $500 per occurrence, incurred to company-owned vehicles they were driving. Unlike the situation discussed above, this violation was fully and fairly litigated. Although the General Counsel did not amend the complaint to allege that this conduct was a violation, the subject was discussed at length at trial, and testimony was presented by both sides. The Respondent argued

[3] In a supplemental decision in Cases 32–RD–552 and 32–RM–362, the Regional Director deferred his decision on three determinative challenged ballots pending the resolution of the three voters' employee status under the parties' contractual grievance-arbitration procedures, and he deferred action on the Union's objections until such time as the election's outcome was known.

[4] 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[5] 299 NLRB 914 (1990).

[6] Member Raudabaugh does not pass on whether he agrees with *Krueger*. Member Oviatt continues to adhere to the position he took in his dissent in *Krueger*.

[7] The Respondent also relies on *Ellex Transportation*, 217 NLRB 750 (1975), in support of its argument that it was privileged to make unilateral changes during the period between the election and the certification of the Union. We note that that case was implicitly overruled for the proposition relied on by the Respondent in *Dresser Industries*, 264 NLRB 1088 (1982), and *Sanderson Farms*, 271 NLRB 1477 (1984). See *Alexander Linn Hospital Assn.*, 288 NLRB 103, 107 fn. 16 (1988); and *Houston Coca-Cola Bottling Co.*, 265 NLRB 766 fn. 2 (1982).

that this requirement was simply a continuation of a previous policy which had existed since 1982, and presented the testimony of its former general manager in support of this position. The judge rejected his testimony as contrary to the express terms of the agreements signed by the sales employees, which agreements were introduced as exhibits during the hearing. The judge offered the Respondent an opportunity to present evidence that in practice it applied the terms of those agreements to motor vehicles other than the employees' own demonstrators, or evidence that it otherwise had a policy, prior to January 1985, of requiring its sales staff to reimburse the Respondent up to $500 for damages incurred to *any* company-owned vehicle they were driving. The Respondent failed to present such proof. Thus, we conclude, as did the judge, that this matter was closely related to other complaint allegations and was fully and fairly litigated. Accordingly, the judge was justified in finding a violation of Section 8(a)(5) and (1).

4. The General Counsel has excepted to the judge's failure to find that the Respondent violated Section 8(a)(5) and (1) by unilaterally reducing new employees' sales commissions to 25 percent of gross profit.[8] We note that the complaint alleges that ''commencing on or about March 1, 1985, Respondent reduced the rate of commission for new salespersons from 35 percent to 25 percent,'' and further that it engaged in this conduct without notice to Local 1095 and without affording Local 1095 an opportunity to bargain about the reduction. The General Counsel adhered to that allegation throughout the course of the hearing and never attempted to amend it.

We find no merit in the General Counsel's exception because nowhere in the record is there evidence that new or beginner sales employees ever received 35 percent commissions. That was the rate paid to journeymen salespersons for the sale of new cars.[9] Beginner salespersons had a lower schedule of minimum commissions, and this practice was written into the parties' collective-bargaining agreement. Thus, the General Counsel has failed to carry the burden of showing that at one time the Respondent paid its beginner sales employees 35-percent commission, and then lowered it at some point to 25 percent. Accordingly, this exception lacks merit.

5. Finally, the General Counsel excepts to the judge's failure to find Attorney Nancy Watson-Tansey in violation of Board Rules for assisting the Respondent's attorney Bobay in the representation of the Respondent in this matter, on the grounds that the case was pending in Region 32 during a time when she was temporarily assigned there. We find merit to this exception.

The Board's Rule[10] against former employees engaging in practice before the Board in conjunction with cases pending in any Regional Office to which the employees were attached during their employment is a prophylactic one, designed to avoid even the appearance of impropriety. *Hillview Convalescent Center*, 266 NLRB 758 (1983). Attorneys leaving their employment with the Board must exercise great care to avoid participating in any case which arose in any Regional Office to which they may have been assigned at any time during their employment, whether or not they had direct involvement in the case.

> No person who has been an employee of the Board and attached to any of its Regional Offices shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any Regional Office to which he was attached during the time of his employment with the Board.

On the facts before us, we find that Watson-Tansey has committed a technical violation of Board's Rule Section 102.119, and should immediately extricate herself from any and all involvement with the matter before us, if she has not already done so.[11] We see no need to take further action against her, because in our view no prejudice to any party has been demonstrated by her involvement. According to her declaration[12] of March 18, 1991, during her 3-month assignment to Region 32 from Region 20 (January through March 1987), the case was in an inactive status and she had no knowledge whatsoever of its existence.[13] Further, she states that she gained no knowledge or information about the Respondent or the cases in which it was involved from that assignment, and only learned of the cases after her employment with the Board had ended. However, on these facts, which have not been challenged, we see no reason to disqualify the Respondent's Attorney Bobay from his representation of the Respondent, as requested by the Charging Party, nor to hold a hearing on the allegations against Watson-Tansey.[14]

[8] No exceptions were filed to the judge's dismissal of other alleged unilateral changes.

[9] Thirty percent was the rate customarily paid for the sale of used cars, and other arrangements were commonly worked out for shared sales, house deals, fleet sales, etc.

[10] Sec. 102.119 of the Board's Rules and Regulations (29 CFR 102.119) states:

[11] It is of no moment that Watson-Tansey did not enter an appearance in this case. We still deem her to have been ''engaged in practice before the Board'' by her conduct here.

[12] This declaration was filed in response to a Notice to Show Cause issued by the Board on February 25, 1991, which gave Watson-Tansey an opportunity to show cause why she should not be reprimanded.

[13] The charge in Case 32–CA–10320 was not even filed until 1989, well after her detail to Region 32 had ended.

[14] Member Raudabaugh dissented from the Notice to Show Cause. At that time, prior to the receipt of any evidence, it was not known

Continued

6. The Respondent contends in its exceptions and as supplemented by its request for judicial notice, that the judge erred by finding that it violated Section 8(a)(5) and (1) by refusing to provide information requested by the Union in connection with the three employees whose discharges were the subject of grievances and arbitrations. It argues that it has already provided sufficient information for the Union's purposes, and that the Union's request has become moot because the District Court for the Northern District of California has ruled that the parties' collective-bargaining agreement limits the amount of backpay owed by the Respondent as a result of arbitration awards to $2000 for each of the three employees involved.

We find no merit in the Respondent's contentions. As to its first point, although the Respondent did provide information to the Union, it is not the payroll information which the Union requested. The Respondent provided employees' W-2 forms, graphs showing median income and average length of employment, and information showing the number of employees hired and working during certain years. However, the Union's information request was for *payroll records*. The Respondent makes much of the fact that the Union did not use the ''representative employee'' formula to calculate backpay for the grievants, as the judge suggested would be appropriate.[15] Without the payroll data, however, it would have been impossible for the Union to employ such a formula. The mere fact that the Union was ultimately able to compute backpay without the payroll records does not lead logically to the conclusion that it never needed those records. It means only that the Union had to use an alternative theory to arrive at backpay figures to present at arbitration. We therefore agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish information requested by the Union in order to carry out its responsibilities as the exclusive representative of the Respondent's sales employees.[16]

As to the Respondent's mootness argument, we note initially that the district court rulings issued in 1989, well after each of the Union's three information requests. Consequently, those rulings did not moot the issue of whether the Respondent violated Section 8(a)(5) by failing to provide, in a timely manner, information which was necessary and relevant to the Union's pursuit of reasonable contract-based backpay claims. Further, in light of the findings that the Respondent did violate Section 8(a)(5), the district court rulings do not moot the need for a Board remedial order directing the Respondent to cease and desist from engaging in such unfair labor practices.

We find that the judge has reasonably accommodated the subsequent judicial rulings by ordering the Respondent to provide only the information requested in the Union's letter of September 16, 1987. That letter requested information regarding the compensation package which the Respondent was offering grievant Johnson in connection with his reinstatement, as well as information about hours, wages, and conditions applicable to all sales employees, to ensure that Johnson was being treated equitably.

As to information requested in other letters, the judge noted that it would be without any possible relevance to the Union if the district court's orders are affirmed by the Court of Appeals for the Ninth Circuit. Accordingly, he recommended that jurisdiction over the allegations concerning the Respondent's unlawful failure to provide information requested in the Union's letters of January 22, 1986, and January 12, 1988, be retained for the limited purpose of entertaining an appropriate and timely motion for further consideration of an appropriate remedy should the Ninth Circuit sustain the Union's appeals of the district court orders. We agree with the judge and adopt his recommendation in this regard.[17]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 1.

''1. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally requiring its salespersons to pay more to the Respondent for damaging the demonstrators they rented from the Respondent, than the $250 limit set by the Respondent's collective-bargaining agreement with Local 1095.''

ORDER

The National Labor Relations Board orders that the Respondent, Southwick Group d/b/a Toyota of Berke-

whether Watson-Tansey had secured ''insider'' information and passed it on to Bobay. Hence, Member Raudabuagh would have required that Watson-Tansey and Bobay respond to the notice and would not have limited the possible sanction to a reprimand. However, given the fact that his colleagues limited the notice as they did, and given the unrebutted evidence secured in response thereto, Member Raudabaugh agrees with the disposition reached here.

[15] See fn. 36 of the judge's decision.

[16] The Respondent also contends that it had no duty to supply the information requested by the Union at a time when recognition had been lawfully withdrawn and the Union had not yet been certified as the sales employees' representative. The information at issue, however, relates to grievances filed during the term of a 1982–1983 collective-bargaining agreement, when the Respondent had an undisputed obligation to recognize the Union as the employees' representative. Notwithstanding the Respondent's subsequent lawful withdrawal of recognition, the Union continued to represent unit employees with respect to the unfinished business of their grievances. We find that the Respondent had a continuing obligation to recognize the Union's representative status in processing these grievances and to supply requested information which was relevant to that limited representative role. *Missouri Portland Cement Co.*, 291 NLRB 1043, 1044 (1988). Also see *Arizona Portland Cement Co.*, 302 NLRB 36 (1991); *Audio Engineering*, 302 NLRB 942 (1991).

[17] The Ninth Circuit's decision has since issued but no motion to vary the remedy has been filed.

ley, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Valerie Hardy-Mahoney, for the General Counsel.
John R. Bobay, for the Respondent.
David Rosenfeld (Van Bourg, Weinberg, Roger & Rosenfeld), for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. The hearing in this consolidated proceeding, held on March 12–14, 1990, was based on the allegations contained in an amended consolidated complaint issued August 7, 1989, by the Regional Director for Region 32 of the National Labor Relations Board (Board), on behalf of the Board's General Counsel, and on an amendment to the amended consolidated complaint issued August 18, 1989, an amendment to the amended consolidated complaint issued January 29, 1990, a third amendment to the amended consolidated complaint issued February 22, 1990, a March 7, 1990 motion to further amend the amended consolidated complaint, which was granted at the outset of the hearing, and further amendments made during the hearing.

The aforesaid amended consolidated complaint and the further amendments thereto are based on unfair labor practice charges filed by Automobile Salesmens Union Local 1095, United Food and Commercial Workers Union, AFL–CIO (Local 1095) and by United Food and Commercial Workers Union, Local 1179, Automobile Sales Division (Local 1179), as follows: Local 1095 filed charges against Southwick Group d/b/a Toyota of Berkeley (Respondent) in Cases 32–CA–6505, 32–CA–7233, 32–CA–7846, and 32–CA–9362, which were served on Respondent on May 25, 1984,[1] May 8, 1985, February 18, 1986, and December 30, 1987, respectively. Local 1179 filed a charge in Case 32–CA–10320 against Respondent, which on May 8, 1989, was served on Respondent.

The amended consolidated complaint, as further amended, alleges in substance that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), as follows: commencing on various dates in 1982, 1983, 1984, and 1985 unilaterally changed specified terms and conditions of employment of its employees represented by Local 1095 without affording Local 1095 an opportunity to negotiate about such changes and their effects upon the employees; on various dated in 1986, 1987, and 1988 refused to furnish Local 1095 with certain information concerning employees' wages and hours of employment, which the complaint alleges was relevant and necessary to Local 1095 in carrying out its statutory duties and responsibilities as the employees' bargaining representative; and, since November 1, 1988, Local 1179 has been the legal successor to Local 1095 as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees, and since on or about March 7, 1989, Respondent has failed and refused to recognize and bargain with Local 1179 as the exclusive bargaining representative of those employees. In its answer to the amended consolidated complaint and in its answer to the several amendments thereto, Respondent denies it engaged in the alleged unfair labor practices, denies that Local 1179 is the legal successor to Local 1095, and, as an affirmative defense, contends that the complaint allegations involving the unilateral changes in the employees' terms and conditions of employment should be dismissed in their entirety because they are barred by the limitations proviso to Section 10(b) of the Act.[2]

On the entire record, and from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Background*

The Respondent is a corporation which owns and operates several motor vehicle dealerships. The only dealership involved in this proceeding is located in Berkeley, California, doing business as Toyota of Berkeley, where Respondent is engaged in the retail sale and service of motor vehicles.

The salespersons employed by Respondent at Toyota of Berkeley were represented by Local 1095 from at least 1980 until December 13, 1983, and were covered by a collective-bargaining agreement between Local 1095 and Respondent, which by its terms was effective from October 1, 1982, through May 31, 1983.

In 1983, prior to December 13, 1983, negotiators for Respondent and Local 1095 met and bargained on several occasions for a successor contract, but with no success.

On December 13, 1983, one of Toyota of Berkeley's salespersons filed a petition with the Board's Regional Director for Region 32, which was docketed as Case 32–RD–552. The petition questioned Local 1095's representative status and sought a Board-conducted secret-ballot election to determine whether or not the salespersons employed at Toyota of Berkeley still wanted Local 1095's representation. On the same day, December 13, Respondent withdrew recognition from Local 1095, as the salespersons' exclusive bargaining representative. This withdrawal was apparently based on Respondent's good-faith doubt of Local 1095's continued majority status. Subsequently, on December 19, 1983, Respondent filed a petition with the Board's Regional Director for Region 32, which was docketed as Case 32–RM–362. The petition questioned Local 1095's status as the representative of Respondent's motor vehicle salespersons and asked that the Board conduct a secret-ballot election to determine whether or not the salespersons desired to be represented by that union. The Regional Director consolidated Case 32–RM–362 with Case 32–RD–552.

Pursuant to a Decision and Direction of Election issued in Cases 32–RD–552 and 32–RM–362, by the Board's Regional

[1] On June 6, 1984, an amended charge in Case 32–CA–6505 was filed and served on the Respondent.

[2] In its answer to the amended consolidated complaint Respondent admits it meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. It also admits that Local 1095, during the time material, was a labor organization within the meaning of Sec. 2(5) of the Act. The record establishes that Local 1179 is a labor organization within the meaning of Sec. 2(5) of the Act.

Director on January 24, 1984, a secret-ballot election was conducted on Respondent's premises on February 22, 1984, in a unit of Respondent's full-time and regular part-time salespersons. The official tally of ballots shows that of approximately 10 eligible voters, 5 cast ballots for and 5 cast ballots against Local 1095. There were five challenged ballots, which were sufficient to affect the results of the election. All three parties, the Respondent, the Employee Petitioner, and Local 1095, filed timely objections to the election.

On May 11, 1984, the Regional Director issued a supplemental decision on objections and challenged ballots, in Cases 32–RD–552 and 32–RM–362, which overruled in their entirety the objections filed by Respondent and the Employee Petitioner, and sustained the challenges to two of the five challenged ballots. The Regional Director deferred his decision on the challenges to the ballots cast by Bill Eckels, Edward Fontes, and Floyd Johnson until such time as the grievances filed by Local 1095 protesting their discharges had been resolved under the grievance-arbitration procedure of the parties' collective-bargaining agreement.[3] In addition, he deferred his decision on Local 1095's objections until such time as the results of the election were conclusively determined.

Thereafter, on July 1, 1988, the Regional Director issued a second supplemental decision on challenged ballots and order, which overruled the challenges to the ballots of Eckels, Fontes' and Johnson and ordered that their ballots be opened and counted and that a revised tally of ballots issue. In overruling the challenges to their ballots, the Regional Director concluded that the arbitrator's opinions and awards which had directed Respondent to reinstate Eckels, Fontes, and Johnson had been upheld by the courts and, in view of this, that these employees had been employees of the Respondent at the time of the election and thus were eligible to vote.

On July 13, 1988, Respondent filed with the Board a request for review of the Regional Director's above-described second supplemental decision. Respondent's request for review challenged the Regional Director's decision in just one respect; Respondent argued that the Regional Director erred in concluding that ''the arbitrator's opinion and award over the discharge of Ed Fontes had been upheld,'' arguing the the court of appeals had not confirmed the award. On September 28, 1988, the Board issued an order denying Respondent's above-described request for review.

On October 12, 1988, the Board's Regional Director opened the challenged ballots cast by Eckels, Fontes, and Johnson and on that date issued a revised tally of ballots which showed that Local 1095 had received 8 of the 13 votes counted, a majority.

On October 17, 1988, the Board's Regional Director, on behalf of the Board, issued a ''Certification of Representative'' certifying that Local 1095 was the exclusive collective-bargaining representative of ''all full time and regular part time employees engaged in the sale of new and used automobiles and trucks employed by [Respondent] at its Berkeley, California facility; excluding all employees covered by other collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.''

In August 1988 Local 1095's executive board appointed a merger committee to explore the possibility of Local 1095 merging with another labor organization. In September 1988 the merger committee recommended that Local 1095 merge with Local 1179. Subsequently, as described in detail supra, on October 5, 1988, Local 1095's membership voted to merge with Local 1179 and said merger became effective November 1, 1988, at which time Local 1095 ceased to exist.

As described in detail supra, following the merger of Local 1095 into Local 1179, Respondent refused to recognize and bargain with Local 1179 as the successor to Local 1095.

B. *The Validity of Local 1095's Certification*

In its answer to the complaint Respondent alleged, as an affirmative defense, that the Board's October 17, 1988 certification of Local 1095, as the exclusive collective-bargaining representative of Respondent's motor vehicle salespersons, was not valid because the Board's Regional Director erred in overruling the challenges to the ballots cast by Eckels, Johnson' and Fontes. However, as described supra, Respondent did not request the Board to review the Regional Director's rulings on the challenges to the ballots cast by Eckels and Johnson, as provided in Section 102.67(b) of the Board's Rules and Regulations. This precludes Respondent from attacking those rulings before the Board in the instant related unfair labor practice proceeding. *S. S. Kresge Co.*, 169 NLRB 442, 443 (1968); *Retail Clerks Local 1401 (Zinke's Food) v. NLRB*, 463 F.2d 316 (D.C. Cir. 1972). For, it is settled that, absent newly discovered or previously unavailable evidence, a party may not relitigate in an 8(a)(5) proceeding before the Board issues which were or could have been raised in a related representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *NLRB v. Tennessee Packers*, 379 F.2d 172, 179–180 (6th Cir. 1967). Therefore, even assuming the Regional Director erred when, with the approval of the Board, he decided that the challenge to Fontes' ballot should be overruled, it would not taint Local 1095's certification because, even without Fontes' vote, Local 1095 would still have secured a majority of the votes cast.

In any event, assuming Respondent in this proceeding is not precluded from contesting the ballots of Johnson and Eckels, as well as Fontes' ballot, the evidence it presented failed to establish that either Eckels or Johnson or Fontes were not entitled to reinstatement pursuant to the arbitrators' awards. Quite the opposite, the evidence Respondent presented, Respondent's Exhibits 13 and 14, reinforces the Regional Director's conclusion that Eckels, Johnson, and Fontes were each entitled to reinstatement pursuant to the arbitrators' awards.

It is for all the above reasons that I reject Respondent's argument that Local 1095's October 17, 1988 certification is invalid.

C. *The Refusal to Recognize and Bargain with Local 1179*

As I have found, supra, Local 1095 was certified by the Board on October 17, 1988, to represent the motor vehicle

[3] Eckels, Fontes, and Johnson, employed by Respondent as salespersons, had been terminated during the term of the 1982–1983 collective-bargaining agreement between Local 1095 and Respondent. Local 1095 had filed grievances under the agreement's grievance-arbitration provisions, protesting their discharges.

salespersons employed by Respondent at Toyota of Berkeley, but on November 1, 1988, Local 1095 ceased to exist when it merged with and became a part of Local 1179. Subsequently, on November 2, 1988, Local 1095's attorney, David Rosenfeld, wrote Respondent's representative, Labor Relations Consultant David Comb, and demanded that Respondent commence collective-bargaining negotiations with Local 1095 for a contract covering the employees in the certified bargaining unit. In response Comb wrote Attorney Rosenfeld and acknowledged Respondent's bargaining obligation to Local 1095 and stated Respondent was available to begin negotiations with Local 1095's negotiator, Yates Kendrick, at times and places mutually agreeable, and asked that Kendrick suggest dates for the negotiation sessions. However, prior to the start of the negotiations, Comb wrote Attorney Rosenfeld on February 9, 1989, that ''it is my information that . . . Local 1095 no longer exists. Accordingly, the [Respondent] has a good faith doubt it has any obligation to either recognize or bargain with Mr. Kendrick or whatever Union he purports to represent.'' Attorney Rosenfeld responded by letter to Comb dated March 7, 1989, in which he informed Comb that Local 1095 had merged into Local 1179, but that ''a continuity of representation has been maintained,'' and explained why, in his opinion, there was a continuity of representation, and further informed Comb that since Local 1179 was the successor to Local 1095, Respondent was legally obligated to recognize and bargain with Local 1179. Respondent failed to respond to Attorney Rosenfeld's March 7, 1989 letter. I therefore find that on or about March 7, 1989, Respondent refused to recognize and bargain with Local 1179 as the exclusive collective-bargaining representative of the motor vehicle salespersons employed by Respondent at Toyota of Berkeley. The amended complaint alleges that by engaging in this conduct Respondent violated Section 8(a)(5) and (1) of the Act.[4] The merit of this allegation depends on whether Local 1179 lawfully succeeded to Local 1095's October 17, 1988 certification by the Board, as the exclusive bargaining representative of the motor vehicle salespersons employed by Respondent at Toyota of Berkeley. The complaint, in this respect, alleges that when, on November 1, 1988, Local 1095 merged with Local 1179, and became a part of Local 1179, that Local 1179 ''maintained a continuity of representation of the [employees employed by Respondent in the unit certified by the Board on October 17, 1988, in Cases 32–RM–362 and 32–RD–552], and is the legal successor to Local 1095.'' The applicable legal principles are set forth and the pertinent evidence is evaluated, in the light of those principles, below.

The Applicable Legal Principles

The law is settled that when a local union decides to affiliate or merge with another labor organization, that such organizational changes standing alone do not affect the representative status of the bargaining agent or terminate an employer's duty to bargain with that agent. E.g., *NLRB v. Insulfab Plastics*, 789 F.2d 961 (1st Cir. 1986); *NLRB v. Newspapers, Inc.*, 515 F.2d 334 (5th Cir. 1975). See also *NLRB v. Financial Institution Employees (Seattle-First*), 475 U.S. 192 (1986) . This is so because ''[t]he industrial stability sought by the Act would unnecessarily be disturbed if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship,'' thus a change in union structure will not affect the union's status as representative of the unit employees ''unless the Board finds that the [change] raises a question of representation'' under Section 9(a) of the Act. *Seattle-First*, supra at 202–203, 209 (1986).[5] Accordingly, the Board will not automatically permit name changes, mergers, affiliations, or other union organizational changes to automatically disrupt an existing union-employer collective-bargaining relationship. Rather the Board applies its traditional two-pronged test to determine whether an employer is obligated to recognize and bargain with a merged union—i.e., whether the merger vote occurred under ''circumstances satisfying minimum due process'' and whether there was substantial continuity between the pre- and post-merger union. *News/Sun-Sentinel Co.*, 290 NLRB 1171 (1988), enfd. 890 F.2d 430 (D.C. Cir. 1989); *May Department Stores Co.*, 289 NLRB 661 (1988), enfd. 897 F.2d 221 (7th Cir. 1990).

The Board has long held that an employer's bargaining obligation continues after a merger or affiliation only if the union members were given a fair opportunity to consider and vote on the change. This requirement has traditionally involved the Board in examining whether the relevant election was conducted in accordance with ''due process safeguards,'' including notice of the election to all eligible voters, an opportunity for voters to discuss the election, and reasonable precautions to maintain ballot secrecy. See *Newspapers, Inc*., 210 NLRB 8, 9 (1974), enfd. 515 F.2d 334 (5th Cir. 1975). See also *May Department Stores Co.*, 897 F.2d 221, supra. The failure to permit employees who have not become union members to participate in the merger decision and election does not violate these due-process safeguards. *Seattle-First*, supra; *News/Sun Sentinel Co.*, 290 NLRB 1171 (1988), enfd. 890 F.2d 430 (D.C. Cir. 1989). Nor does such an election have to comport with the standards of a Board-conducted certification election. Rather, ''the Board requires that the vote itself occurs under circumstances satisfying minimum due process,'' and no specific procedures are mandated. *Hammond Publishers*, 286 NLRB 49 (1987); *East Dayton Tool Co.*, 190 NLRB 577, 579 (1971).[6] Also the employer who challenges a merger vote has the burden of making an affirmative showing of the insufficiency of the reorganization procedure. *News/Sun Sentinel Co.*, supra; *Insulfab Plastics*,

[4] The amended complaint alleges essentially that since ''on or about March 7, 1989'' Respondent has failed and refused to recognize and bargain with Local 1179 as the exclusive bargaining representative of the motor vehicle salespersons employed by Respondent at Toyota of Berkeley, thereby violating Sec. 8(a)(5) and (1) of the Act.

[5] Although *Seattle-First* involved an independent local union's affiliation with an international organization, the same standards apply to other union organizational restructuring, such as a merger. *Hydrotherm, Inc.*, 280 NLRB 1425, 1428 (1986). See also *May Department Stores Co.*, 289 NLRB 661 fn. 4 (1988).

[6] In *Seattle-First* the Supreme Court expressly declined to decide whether, once the Board has found continuity of the representative after a reorganization, the Board is authorized to find that the representative has lost its bargaining rights solely on the grounds that the reorganization was accomplished in disregard of the Board's standard of due-process. 475 U.S. at 199, fn. 6. Since in the instant case I have concluded, infra, that the Board's traditional due process criteria were met, I have not considered this issue.

274 NLRB 817, 821 (1985), enfd. 789 F.2d 961 (1st Cir. 1986).

> In determining whether a ''question concerning representation'' exists because of a lack of continuity, the Board is not directly inquiring into whether there is majority support for the labor organization after the changes at issue, but rather is seeking to determine whether the changes are so great that a new organization has come into being—one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance. *In Western Commercial Transport*, 288 NLRB 214 (1988) the Board stated: The focus of inquiry is on whether the changes are ''sufficiently dramatic to alter the union's identity,'' so as to raise a question concerning representation. *May Department Stores Co.*, 289 NLRB 661, supra, citing *Seattle-First*, 475 U.S. 192, 206 (1986). See also *News/Sun Sentinel Co.*, at fn. 1, and *May Department Stores Co. v. NLRB*, supra. Consequently, the Board considers a range of factors including the continued leadership responsibilities of the existing union officials, the perpetuation of membership rights and duties, the continuance of the manner in which contract negotiations, administration, and grievance processing are effectuated, and the preservation of the certified representative's assets, books, and physical facilities. E.g., *Western Commercial Transport*, supra. However, in applying this fact specific approach ''no strict check list is used,'' rather ''[t]he Board considers the totality of a situation.'' *May Department Stores Co. v. NLRB*, quoting with approval *Yates Industries*, 264 NLRB 1237, 1250 (1982). And, the burden of proving a change in a union's identity rests with the respondent-employer. *H. B. Design & Mfg.*, 299 NLRB 73 (1990); *Insulfab Plastics*, 274 NLRB 817, 821 (1985), enfd. 789 F.2d 961 (1st Cir. 1986).

The Issue of ''Due Process''

Early in September 1988, Local 1095's executive board appointed a merger committee to explore a merger with another labor organization. Later in September, the merger committee met with officials of Local 1179 and discussed the possibility of Local 1095 merging with that union. As a result of those discussions, Local 1095's merger committee concluded it would be in the best interest of Local 1095 to merge with Local 1179, and on September 29, 1988, at a meeting of Local 1095's executive board, recommended that Local 1095 merge with Local 1179. The executive board agreed and decided to recommend to Local 1095's members that such a merger take place.

On October 4, 1988, at a meeting of Local 1095's membership, the executive board of Local 1095 presented to the members and discussed with them the proposed merger. Fifteen days before the October 4 membership meeting, Local 1095 mailed notices to all of its members which informed them of the proposed merger with Local 1179 and notified them that at the membership meeting scheduled for October 4, 1988, the proposed merger would be on the agenda for discussion and that the details of the merger would be explained to the members at that time, and that on the following day, October 5, the members would be afforded the opportunity to vote on whether or not they wanted Local 1095 to merge with Local 1179.[7] In addition, Local 1095's monthly newsletter for September 1988, which the members of Local 1095 received during September 1988, contained a front page article entitled ''Members To Vote On Local 1179 Merger,'' which notified the members that on October 5 they would have the opportunity to vote on a merger between Local 1095 and Local 1179 and that the subject of the merger would be the main topic of discussion at the general membership meeting scheduled for October 4. The newsletter article, as did the above-described notice mailed by Kendrick to the members, gave the location and time of the October 4 membership meeting and stated where the October 5 merger vote would take place and the hours for voting. The article also quoted Kendrick and other officials of Local 1095, as well as Local 1179's president, as being in favor of the merger and gave their reasons for supporting the merger.

On October 4 approximately 100 Local 1095 members attended the scheduled membership meeting. During the meeting documents pertaining to the merger were either read to the members or given to them to read, and the terms and conditions of the merger were explained to the members and there was a discussion by the members about the merger.

On October 5, 1988, as scheduled, a secret ballot election was held at Local 1095's office concerning the proposed merger. Of Local 1095's approximately 370 members, 120 cast ballots. Each voter, after having his or her name checked off by the three members of Local 1095 who served as election observers, went into another room where a voting booth had been set up and, in the privacy of the booth, marked their ballot and then placed it in a ballot box. The result of the election was that 119 members voted for and 1 voted against the merger.[8] No one raised any objection to the mechanics of the voting or complained that he or she was denied due process. Thereafter, on October 28, 1988, Local 1179 afforded its members an opportunity to vote on the proposed merger, and of the 28 members of Local 1179 who voted, 19 voted for and 9 against the merger. The merger was effective November 1, 1988, on which date Local 1095 ceased to exist.

In sum, as described in detail supra, Local 1095 gave its members sufficient notice of the October 5, 1988 merger vote, an opportunity to discuss and make an informed deci-

[7] Local 1095's secretary-treasurer, Yates Kendrick, who personally mailed these notices, credibly testified he mailed them prior to the September 29 executive board meeting, because the merger committee wanted to give the members notice of the proposed merger at least 15 days prior to both the October 4 membership meeting and the October 5 vote on the merger. Kendrick explained that if, on September 29, Local 1095's executive board had rejected the merger committee's recommendation, the scheduled discussion of the merger at the October 4 membership meeting and the scheduled October 5 merger vote would have been called off.

[8] Based on the testimony of Yates Kendrick. On October 5, 1988, at the conclusion of the election, the sealed envelope which contained the ballots, the voting eligibility list, and the tally of ballots, was placed in Local 1095's office safe. The fact that this envelope was lost, apparently when the contents of the safe were removed from Local 1095's to Local 1179's office, subsequent to the merger, does not detract from Kendrick's testimony concerning the results of the election. Kendrick's testimonial demeanor was good; he impressed me as a sincere and conscientious witness.

sion regarding the proposed merger, and an opportunity to vote. It is equally clear, as described in detail supra, that the integrity and secrecy of the ballots were maintained. In this regard, I also note that there was no evidence that the balloting was tainted in any manner.[9] Quite the opposite, it is undisputed that no one complained that he or she was denied due process in connection with the voting or otherwise complained about the manner in which the election was conducted. In view of the foregoing, I find that due process was observed in the conduct of the October 5, 1988 merger vote.

I reject Respondent's contention that the merger vote was invalid under the Act because it was conducted in derogation of the provisions in Local 1095's constitution and bylaws which provided that Local 1095 could not entertain a resolution to surrender its charter to its international union unless its members were notified of this resolution by certified mail at least 60 days prior to the regular membership meeting at which such a resolution could be voted upon, and which further provided that Local 1095's bylaws could be amended only after certain procedures were followed, which were not followed in connection with the October 5 merger vote. Assuming arguendo, that these constitution and bylaw provisions were meant to apply to the instant merger vote, Local 1095's failure to comply with them did not taint the merger vote because Local 1095's members were notified of the proposed merger and the merger vote approximately 15 days in advance of the merger vote and thus had approximately 2 full weeks to consider the merger before casting their ballots. See *J. Ray McDermott & Co.*, 223 NLRB 857–857 (1976), enfd. 571 F.2d 850, 855–856 (5th Cir. 1978) (notice mailed 4 days before meeting sufficient to give members adequate opportunity for debate). Respondent has cited no authority for the proposition that where, as here, a merger vote has been conducted only after the union members were given a fair opportunity to consider and vote on the merger, that the vote will be declared invalid for purposes of the Act, if the vote did not meet the more stringent requirements set forth in the union's constitution and/or bylaws. The law is to the contrary. *J. Ray McDermott & Co.*, supra at 859–860, *Hamilton Tool Co.*, 190 NLRB 571, 574 fn. 8 (1971).

The Issue of ''Continuity''

Local 1095, whose office was in San Leandro, California, and Local 1179, whose office is in Martinez, California, were sister locals, affiliated with the same international organization, the United Food & Commercial Workers International Union. They were bound by their international union's constitution, but maintained separate bylaws.

Local 1095's trade jurisdiction encompassed those persons who performed work connected with or related to the sale, distribution or the leasing of motor vehicles, and its geographic jurisdiction encompassed all of the counties in central and northern California including Contra Costa County. During the time material, immediately prior to the merger of the two local unions, Local 1095 had approximately 370 members and net assets of $338,844.

Local 1179's trade jurisdiction encompasses those persons who sell goods or services of any kind and its geographical jurisdiction is limited to one county in Northern California, Contra Costa. During the time material, immediately prior to the merger of the two local unions, Local 1179 had approximately 5000 members and net assets of almost $2 million.

Local 1095, immediately prior to the merger, represented motor vehicle salespersons employed at 31 or 32 motor vehicle dealerships and had collective-bargaining contracts with 28 of those dealerships.

Local 1179, immediately prior to the merger, had collective-bargaining contracts with approximately 30 different employers covering employees employed in grocery, department and hardware stores, and only one contract with a motor vehicle dealership.

Yates Kendrick, who at the time of the merger was Local 1095's president and secretary-treasurer, testified that the reason why Local 1095 merged with Local 1179 was that Local 1095 was not growing and in the past 2 years had lost approximately 100 members, and by merging with Local 1179, what had formerly been Local 1095 would have more resources available for its use, yet, under the terms of the merger, not lose any of its jurisdiction and be able to maintain the same goals.

Immediately prior to the merger, Yates Kendrick was Local 1095's president and secretary-treasurer.[10] Its remaining officers consisted of three vice presidents and a recording secretary.

None of Local 1095's officers became officials of Local 1179, except for Kendrick, who, as a condition of the merger, became one of Local 1179's vice presidents. In this regard, the record shows that as a part of the parties' merger agreement, Local 1179 amended its bylaws so that one of its nine vice presidents would be from its newly created Automobile Sales Division, and Kendrick was appointed vice president pursuant to that amendment. As a vice president of Local 1179, Kendrick automatically became a member of Local 1179's executive board. The record also reveals that the vice presidents of Local 1179, including the one reserved for a member of Local 1179's Automobile Sales Division, are elected by Local 1179's entire membership.

Following the merger, Kendrick moved his office from Local 1095's San Leandro facility to Local 1179's office in Martinez. However, Local 1095's San Leandro facility is still being used by Local 1179's Automobile Sales Division. Since the merger it has been open for business 3 days a week, from 9 a.m. to 4 p.m. The Automobile Sales Division uses the San Leandro facility to store records pertaining to members of the Division, to sign up new members for the Division, to conduct contract negotiations, and Kendrick meets there with members of the Division.

Prior to the merger Local 1095 employed two employees, Kendrick and an office clerical. After the merger Kendrick remained in the employ of Local 1179's Automobile Sales Division and performed essentially the same duties as an em-

[9] Respondent bore the burden of proving an ''irregularity in the voting process as it is [Respondent] that is relying on the irregularity as justification for its refusal to bargain.'' *News/Sun Sentinel Co.*, supra; *Insulfab Plastics*, supra.

[10] In June 1988 Local 1095's president, Richard Salvaressa, resigned for health reasons and Local 1095's executive board appointed Kendrick as acting president. Subsequently, on October 27, 1988, the executive board made his appointment as president permanent because they concluded it would be easier to effect the merger of the two local unions if Kendrick occupied the position of president, as well as secretary-treasurer.

ployee, as he had performed previously. The office clerical was terminated, but was replaced with another office clerical, hired on November 1, 1988. This new hire previously had been employed by Local 1095 as a clerical prior to the merger.

One of the conditions of the merger was that Local 1179 establish an Automobile Sales Division and that Yates Kendrick, Local 1095's president and secretary-treasurer, be employed as the director of the newly created Automobile Sales Division, at essentially the same salary he received from Local 1095, and become one of Local 1179's vice presidents and a member of its executive board. Another condition of the merger was that the geographic jurisdiction and trade jurisdiction of the newly created Automobile Sales Division be identical to Local 1095's geographic and trade jurisdiction. Accordingly, when Local 1095 merged with and became a part of Local 1179, Local 1095's members became members of a separate division of Local 1179, known as the Automobile Sales Division, United Food & Commercial Workers Union, Local 1179.

The Automobile Sales Division of Local 1179 has a much larger geographic and a much narrower trade jurisdiction than Local 1095's geographic and trade jurisdiction. In addition, the members of Local 1179's Automobile Sales Division pay monthly dues of $37, essentially the same amount of dues they paid while members of Local 1095, whereas the other members of Local 1179 have an entirely different dues structure and pay their dues on a quarterly basis.[11] The former members of Local 1095, who, as a result of the merger, became members of Local 1179's Automobile Sales Division, paid no initiation fee and the initiation fee for new members of the Automobile Sales Division is the same as it had been for new members of Local 1095.

Subsequent to the merger, all of the employers who had recognized Local 1095 as their motor vehicle salespersons' collective-bargaining representative continued to recognize Local 1179's Automobile Sales Division as their salespersons' collective-bargaining representative and the employers who had collective-bargaining contracts with Local 1095 recognized that Local 1179's Automobile Sales Division had succeeded to Local 1095's rights and obligations under those contracts.

Prior to the merger, Local 1095's secretary-treasurer Yates Kendrick administered the aforesaid collective-bargaining contracts and was the representative of Local 1095 who negotiated and signed those contracts. Likewise, it was Kendrick who handled and processed the contractual grievances filed by employees against employers. Subsequent to the merger, Kendrick, in his capacity as director of the Automobile Sales Division of Local 1179, has administered the aforesaid contracts and the new or successor contracts entered into by the Automobile Sales Division,[12] and is the person who handles and processes employee grievances filed under those contracts.[13] Kendrick is also the one, who, on behalf of the Automobile Sales Division, negotiates new contracts with employers, and, with Local 1179's president, signs these contracts on behalf of the Automobile Sales Division. The record reveals that these contracts are entered into between an employer and the Automobile Sales Division, United Food & Commercial Workers Union, Local 1179, rather than simply by Local 1179. During the contract negotiations which have taken place since the merger, various officials of Local 1179 have been present and occasionally some of them participate in the negotiations. However, Kendrick has been the primary spokesperson for the union in these negotiations.

Prior to the merger, Kendrick, on behalf of Local 1095, was processing a contractual grievance for one employee and following the merger, on behalf of Local 1179's Automobile Sales Division, Kendrick continued to process that grievance.

During his tenure as Local 1095's secretary-treasurer, Kendrick had the authority to call a strike, and since the merger has had the same authority as the director of Local 1179's Automobile Sales Division. In those instances when a strike vote is called involving an employer whose employees are represented by the Automobile Sales Division, only those employee-members of Local 1179's Automobile Sales Division employed by that employer are entitled to vote. Likewise, only those employee-members of Local 1179's Automobile Sales Division who work for employers with contracts with the Division have the right to participate in contract ratification votes.

Since Local 1095 and Local 1179 were sister locals of the same international organization, the United Food and Commercial Workers Union, they were bound by the same constitution, and after the merger Local 1179's Automobile Sales Division continued to be bound by that constitution. However, Local 1095 and Local 1179 had different bylaws and after the merger the Automobile Sales Division was bound by Local 1179's bylaws. However, as sister locals, their bylaws were either identical or substantially the same in several areas. Moreover, as I have previously indicated, Local 1179's bylaws were amended in certain significant respects, as a condition of the merger, to accommodate the specific needs of Local 1095's membership. Local 1179's bylaws were amended to establish a semiautonomous Automobile Sales Division within Local 1179 for the former members of Local 1095. The bylaws were further amended so as to give the Automobile Sales Division of Local 1179 the identical trade and geographic jurisdiction as Local 1095's and to provide that the members of the Division would have essentially the same dues and initiation fees and payment schedule as Local 1095. Also, so the members of the Automobile Sales Division interests would be sure to have a voice among the officials of Local 1179, the bylaws were amended to provide that one of Local 1179's constitutional officers, a vice president, would have to be from the Automobile Sales Division. Lastly, in order to take into account the industry in which the members of the Automobile

[11] The dues of Local 1179 members, other than the members of its Automobile Sales Division, are based on a percentage of the members' rates of pay.

[12] In December 1989, based on Kendrick's recommendation, Local 1179's president hired William Silva to be a business representative for the Automobile Sales Division to assist Kendrick in administering the Automobile Sales Division's collective-bargaining contracts. Neither Kendrick nor Silva administer any contracts on behalf of Local 1179, other than those between employers and the Automobile Sales Division.

[13] In handling the contractual grievances filed by employees since the merger, Kendrick has the authority to refuse to pursue an employee's grievance, but the grievants have the right to appeal his decision to Local 1179's executive board.

Sales Division were employed, the automobile sales industry, the section of Local 1179's bylaws dealing with the duties and obligations of its members was amended to provide that the members of the Automobile Sales Division were subject to discipline for ''flagrantly violating good business ethics or failing to sell automobiles in an ethical and legitimate manner'' and for ''making any outside deals that infringe in any way upon the rights of an employer or members,'' provisions which had been included in Local 1095's bylaws.

The title to all of Local 1095's assets—cash, equipment, automobiles, etc.—was immediately transferred to Local 1179 on the date of the merger and, for the most part, Local 1095's physical assets were transferred to Local 1179's Martinez office. No separate account or budget was created for Local 1179's Automobile Sales Division and the dues paid by the members of the Automobile Sales Division are paid into Local 1179's general fund.

Before the merger, Local 1095 held quarterly membership meetings, whereas Local 1179's Automobile Sales Division does not hold membership meetings separate and apart from Local 1179's general membership meetings. Also the members of the Automobile Sales Division of Local 1179 do not vote separately for delegates to the international union convention, rather these delegates are elected by all of Local 1179's members.

Attorney David Rosenfeld was Local 1095's attorney and following the merger had been the attorney for Local 1179's Automobile Sales Division, even though he is not Local 1179's attorney.

I am of the opinion that while the merger of Local 1095 into Local 1179 to form the Automobile Sales Division of Local 1179 resulted in changes, that the Automobile Sales Division of Local 1179 retained enough of Local 1095's old character to render those changes insufficiently dramatic so that the merger did not raise a question concerning representation.

Initially, I note that this case involves a merger between two sister locals affiliated with the same international organization. Mergers of this kind, in contrast to mergers of small local independent unions with international organizations, have less inherent potential for significant change. Note, *Union Affiliation and Collective Bargaining*, 128 U.Pa.L.Rev. 430, 457 (1979). Here, following the merger, the same international officers continued to govern and the members of Local 1095 affected by the merger continued to be bound by the same international constitution, and, even though the two locals had their own bylaws, several of their bylaw provisions were either identical or substantially identical. In addition, Local 1179's bylaws were amended in certain significant respects, as a condition of the merger, to accommodate the specific needs of Local 1095's membership. Local 1179's bylaws were amended to establish a semiautonomous Automobile Sales Division within Local 1179 for the former members of Local 1095. The bylaws were also amended to give the Automobile Sales Division of Local 1179 the identical trade and geographic jurisdiction as Local 1095's and to provide that the members of the Division would have essentially the same dues and initiation fees and payment schedule as under Local 1095. In addition, so that the Automobile Sales Division members' interest would be sure to have a voice among the officials of Local 1179, the bylaws were amended to provide that one of Local 1179's constitutional officers, a vice president, would have to be from the Automobile Sales Division. Lastly, in order to take into account the industry in which the members of the Automobile Sales Division were employed, the section of Local 1179's bylaws dealing with the duties and obligations of its members was amended to include certain work rules, described in detail supra, which had been included in Local 1095's bylaws.

In determining there was a substantial degree of continuity between the premerger Local 1095 and the postmerger Local 1179, it is also significant that after the merger Local 1095 did not surrender control over its representation and collective-bargaining functions. As described in detail supra, Local 1095's members were taken into Local 1179 as a part of a separate and semiautonomous division, the Automobile Sales Division, and all of the important representation and collective-bargaining functions, formerly exercised by Local 1095 remained in the hands of Local 1179's Automobile Sales Division, including the control of collective-bargaining contract negotiations, day-to-day contract administration, the handling of employees' grievances, the ratification of contracts and the calling of strikes. In this regard, the person who, on behalf of Local 1095's members, had negotiated collective-bargaining contracts with covered employers, administered those contracts, processed members' grievances under those contracts,[14] and had the authority to have employee-members strike in case contract negotiations reached impasse, was the same person who performed those duties on behalf of Local 1179's Automobile Sales Division. This person was Yates Kendrick, Local 1095's secretary-treasurer and president at the time of the merger, who, as a condition of the merger was appointed the director of Local 1179's Automobile Sales Division. See *NLRB v. Insulfab Plastics*, 789 F.2d 961, 966 (1st Cir. 1986), where the court quoting from *St. Vincent Hospital v. NLRB*, 621 F.2d 1054, 1057 (10th Cir. 1980), stated that ''when the same persons participate in communications with the [employer] with respect to grievances, contract negotiations, and the like, continuity is likely to be preserved.'' Here, the creation of the Automobile Sales Division and Kendrick's employment as the director of the Division meant continuity in those areas most important to the average employee and most likely to affect the employee-members' perception of the union as continuing unchanged. This perception was reinforced by the fact that Local 1095's members in good standing were accepted as members of Local 1179's Automobile Sales Division with no new initiation fee or requirements, and continued to pay essentially the same monthly dues as they have paid as members of Local 1095.

Further indicia of the substantial continuity between premerger Local 1095 and postmerger Local 1179, are as follows: Local 1179's Automobile Sales Division, as a condition of the merger, was given Local 1095's trade and geo-

[14] I have considered that the members whose grievances are denied by Kendrick have the right to appeal his decision to Local 1179's executive board. But, there is no showing that in the more than 1 year since the merger, this has ever occurred, or, if it did occur, that Local 1179's executive board overruled Kendrick's decision. It is also significant that under Local 1095's bylaws, the members of Local 1179's Automobile Sales Division, while members of Local 1095, also had the right to appeal Kendrick's denial of their contractual grievances to Local 1095's executive board.

graphic jurisdiction; Local 1179's Automobile Sales Division conducted significant and substantial business at the former office of Local 1095; Local 1179's Automobile Sales Division assumed all of the collective-bargaining contracts between Local 1095 and the covered employers; all of the employers, who, recognized Local 1095 as their employees' collective-bargaining representative, continued to recognize Local 1179's Automobile Sales Division as the employees' representative; and, the former employee-members of Local 1095, as members of Local 1179's Automobile Sales Division, exercised the same authority after, as before the merger, with respect to ratification of the collective-bargaining contracts negotiated on their behalf by Kendrick and with respect to whether or not to strike in support of their union's bargaining position.

I have considered that, other than Kendrick, none of the former officials of Local 1095, have a role in governing Local 1179. However, the presence of Kendrick, who, was Local 1095's principal official and employee at the time of the merger, on Local 1179's executive board and as one of its vice presidents, insures that any distinctive interests of the former Local 1095 members will be brought to the attention of Local 1179's officials and its executive board.

Nor, contrary to Respondent's contention, is it significant that Local 1095's members are now members of a local union that is substantially larger in size than Local 1095. For, in *Seattle-First*, the Supreme Court recognized that the increased size, financial support, and bargaining power that affiliations and mergers create are the ordinary, valid reasons for such affiliations and mergers. 475 U.S. 198–199 fn. 5. See also *May Department Stores Co. v. NLRB*, 897 F.2d at fn. 9; *NLRB v. Insulfab Plastics*, 789 F.2d 961, 967–968 (1st Cir. 1986).

I have also considered that Local 1095's assets were transferred into Local 1179's general fund and that no separate account or budget is maintained by Local 1179 for its Automobile Sales Division and that the dues payments of the members of the division are paid into Local 1179's general fund. There is no showing, however, that the Automobile Sales Division of Local 1179 has less money, than Local 1095, to represent its members. Quite the opposite, Kendrick testified that no money limits have been imposed upon the Automobile Sales Division and that it has the full resources of Local 1179 behind it in connection with its efforts to represent its employee-members.

In sum, although the merger brought changes, I find that there was substantial continuity between premerger Local 1095 and postmerger Local 1179 because of the following (see *Montgomery Ward & Co.*, 188 NLRB 551 (1971)): the former members of Local 1095 were taken into Local 1179 as a separate and semiautonomous division, the Automobile Sales Division, which assumed Local 1095's trade and geographic jurisdiction and all of the collective-bargaining contracts between Local 1095 and the covered employers, and continued to conduct significant and substantial business at the former office of Local 1095; Yates Kendrick, Local 1095's principal official and employee, became the principal official and employee of Local 1179's Automobile Sales Division; Kendrick's postmerger authority to negotiate collective-bargaining contracts, to administer such contracts, to process employees' grievances under those contracts, to fashion bargaining proposals, and to call strikes, and the postmerger authority of Local 1095's employee-members to ratify collective-bargaining contracts and to strike, remained identical to their premerger authority; the members of the Automobile Sales Division of Local 1179 continued to be governed by the same constitution as prior to the merger and several sections of Local 1179's bylaws are identical or substantially identical to Local 1095's bylaws, and, as a condition of the merger, Local 1179's bylaws were amended to accommodate the specific needs of Local 1095's members; Local 1095's members were accepted as members of Local 1179's Automobile Sales Division with no new initiation fee or requirements, and continued to pay essentially the same monthly dues as they had paid while members of Local 1095; although Local 1095's officials, other than Kendrick, did not become officials of Local 1179, the presence of Kendrick, Local 1095's principal official and employee at the time of the merger, on Local 1179's executive board and as one of its vice presidents and director of the Automobile Sales Division, insured that any distinctive interest of the former Local 1095 members would be brought to the attention of Local 1179's officials; and, all of the employers who recognized Local 1095 as their employees' collective-bargaining representative continued to recognize Local 1179's Automobile Sales Division as the employees' representative.

In concluding that there was a substantial continuity between premerger Local 1095 and postmerger Local 1179 I considered the changes relied upon by Respondent in its posthearing brief, most of which have been evaluated previously in this section. Not previously evaluated is the fact that the members of Local 1179's Automobile Sales Division did not hold membership meetings separate and apart from the general membership meetings of Local 1179 and that the members of the Automobile Sales Division do not vote separately for delegates to the international union's convention. However, when all of the changes relied upon by Respondent are balanced against the several factors set forth above which indicate there was a continuity between the premerger Local 1095 and the postmerger Local 1179, I am persuaded it warrants the finding that the Automobile Sales Division of Local 1179 retained enough of the old character of Local 1095 so as to render the changes relied on by Respondent insufficiently dramatic to raise a question concerning representation.

Western Commercial Transport, 288 NLRB 214 (1988), relied on by Respondent, is inapposite. There, a small, completely autonomous independent union that represented 136 employees employed by a single employer was replaced by an 8500-member organization, one of whose business agents essentially assumed control of collective-bargaining and day-to-day contract administration for the employees formerly represented by the independent union. In contrast, here, Local 1095 and Local 1179 were sister locals affiliated with the same international organization and governed by the same constitution and, following their merger, Local 1095's principal official, as was the case during his tenure with Local 1095, continued to exercise sole control over the collective-bargaining and day-to-day contract administration and grievance handling on behalf of the employees formerly represented by Local 1095, and the employee-members retained the power to ratify their collective-bargaining contracts and decide whether to strike or not in support of their representative's contract demands. Also unlike *Western Commercial*,

where none of the officials of the independent union became officials of the new union, here, Local 1095's principal officer became a vice president of Local 1179 and a member of its executive board. See *Montgomery Ward & Co.*, 188 NLRB 551 (1971).

Conclusions

Given that due-process safeguards in the merger vote were observed and there exists a continuity of representative, I find that the merger of Local 1095 into Local 1179 was valid for purposes of the Act and raises no question concerning representation.

Having found, supra, that Respondent was obligated to recognize and bargain with Local 1095 as the exclusive bargaining agent of its motor vehicle salespersons employed at Toyota of Berkeley, pursuant to the Board's October 17, 1988 certification in Cases 32–RD–552 and 32–RM–362, and having found, supra, that on or about March 7, 1989 Respondent refused to recognize and bargain with Local 1179 as the exclusive collective-bargaining representative of these employees, and having found, supra, that the merger of Local 1095 into Local 1179 raises no question concerning representation, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 1179 as the exclusive bargaining representative of its motor vehicle salespersons employed at Toyota of Berkeley.

D. *The Unilateral Changes in the Salespersons' Terms and Conditions of Employment*

The motor vehicle salespersons employed by Respondent at Toyota of Berkeley had been represented by Local 1095 since at least 1980 and in 1982 and 1983 were covered by a collective-bargaining contract between Local 1095 and Respondent, effective by its terms from October 1, 1982, through May 31, 1983.

On December 13, 1983, one of the salespersons employed at Toyota of Berkeley filed a petition with Board's Regional Director for Region 32, in Case 32–RD–552, questioning Local 1095's representative status and seeking a Board-conducted secret-ballot election to determine whether or not the salespersons still desired to be represented by Local 1095. On that same day, December 13, Respondent withdrew recognition from Local 1095 as its salespersons' exclusive collective-bargaining representative. There is no contention or evidence that its withdrawal of recognition violated the Act, and, the General Counsel and Charging Party concede that Respondent's December 13, 1983 withdrawal of recognition was permissible under the Act.

Subsequently, on December 19, 1983, Respondent filed a petition with the Board's Regional Director, in Case 32–RM–362, questioning Local 1095's status as the representative of the salespersons employed at Toyota of Berkeley and asked the Board to conduct a secret-ballot election to determine whether those salespersons desired to be represented by that union.

The Board's Regional Director consolidated Cases 32–RD–552 and 32–RM–362 and conducted a secret-ballot election on February 22, 1984. The results of the election were inconclusive because there were sufficient challenged ballots to be determinative of the results of the election. Thereafter, as described in detail supra, in 1988 the Board resolved those challenged ballots and when they were opened and counted in October 1988 the revised tally of ballots revealed that Local 1095 had received a majority of the ballots cast. On October 17, 1988, the Board's Regional Director, on behalf of the Board, issued a ''Certification of Representative'' in Cases 32–RM–362 and 32–RD–552, certifying Local 1095 as the exclusive bargaining agent of Respondent's motor vehicle salespersons employed at Toyota of Berkeley.

The consolidated complaint, as amended, alleges Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment of its Toyota of Berkeley salespersons, without affording Local 1095 an opportunity to bargain about such changes. The complaint, as amended, enumerates several alleged unilateral changes and alleges that one of them occurred during the term of the parties' 1982–1983 Agreement, that another occurred after the expiration of the agreement but before Respondent's December 13, 1983 withdrawal of recognition, and the remainder occurred during 1984 and 1985, following the February 22, 1984 representation election.

Regarding the alleged unilateral changes which occurred in 1984 and 1985, counsel for the General Counsel contends Respondent acted at its peril in making those changes during the period the challenges and objections to the February 22, 1984 election were pending, and, in view of the fact that the election ultimately resulted in the Board certifying Local 1095, these unilateral changes violated the Act. Counsel for Respondent argues that Respondent was privileged to unilaterally change the salespersons' terms and conditions of employment between the February 22, 1984 representation election and the Board's October 17, 1988 certification of Local 1095, because prior to the election, on December 13, 1983, Respondent had lawfully withdrawn recognition from Local 1095. I am of the opinion that as a matter of law Respondent, in the circumstances of this case, acted at its peril in making unilateral changes in its salespersons' terms and conditions of employment during the period from February 22, 1984, the date of the representation election, and October 17, 1988, the date of the Board's certification of Local 1095, and that if Respondent in fact made the alleged unilateral changes during that period, it violated Section 8(a)(5) and (1) of the Act.[15]

''It is well settled that, absent compelling economic considerations, unilateral changes in terms or conditions of em-

[15] Respondent amended its answer to the consolidated complaint during the hearing to allege, as an affirmative defense, that each of the complaint's unilateral change allegations were barred by the 6-month limitations proviso to Sec. 10(b) of the Act. This defense lacks merit. It is settled that the 6-month limitations proviso to Sec. 10(b) is tolled until the Charging Party has either actual or constructive notice of the alleged unfair labor practice. *Metromedia, Inc. v. NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978); *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986). The Board has ruled that this ''notice, whether actual or constructive, must be clear and unequivocal, and that the burden of showing such notice is on the party raising the affirmative defense of Section 10(b)'' id. at 996. Accord: *Christopher Street Corp.*, 286 NLRB 253 (1987). Here, there is no evidence that Local 1095, the Charging Party, had clear and unequivocal notice, actual or constructive, of any of the alleged illegal unilateral changes here, more than 6 months before it filed the applicable charges. Quite the opposite, the record reveals Local 1095 learned of the alleged unilateral conduct for the first time well within the 10(b) limitations period.

ployment pending determination of objections and challenges are made at an employer's peril,'' and that such changes ordinarily violate the Act if the union is ultimately certified. *San Antonio Portland Cement Co.*, 277 NLRB 338–338 (1985); see also *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416 (D.C. Cir. 1984). The reason for this rule is the recognition that ''[s]uch changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued'' and that ''hold[ing] otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.'' *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enfd. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

Respondent does not contend that ''compelling economic considerations'' required it to act unilaterally during the period between the February 22, 1984 election and Local 1095's October 17, 1988 certification, and presented no evidence to support such a defense. Rather, Respondent contends its December 13, 1983 good-faith doubt of Local 1095's majority status, which allowed it to lawfully withdraw recognition from Local 1095 on that date, excused the unilateral conduct it is alleged to have engaged in between the February 22, 1984 representation election and Local 1095's October 17, 1988 certification. I disagree. Respondent's December 13, 1983 lawful withdrawal of recognition allowed it to unilaterally change the employees' terms and conditions of employment between December 13, 1983, and February 22, 1984. However, the results of the February 22, 1984 representation election were reasonably calculated to place Respondent on notice that there was a good possibility that a majority of its salespersons had voted for Local 1095 as their exclusive bargaining representative and that after investigating the challenged ballots that the Board would determine this was the case and certify Local 1095 as the salespersons' bargaining agent. In view of this, Local 1095's status as an incumbent union from whom Respondent had lawfully withdrawn its recognition several weeks before the representation election, does not undercut the reasons for the application in this case of the Board's usual rule, that absent compelling economic circumstances, unilateral changes in terms and conditions of employment pending determination of objections and challenges are made at an employer's peril, where the union is ultimately certified.

George Braun Packing Co., 210 NLRB 1028 (1974); *Atwood & Morrill Co.*, 289 NLRB 794 (1988); and *Ellex Transportation*, 217 NLRB 750 (1975), cited by Respondent, do not support its contention that an employer's lawful withdrawal of recognition from a union, before or during the pendency of a question concerning representation, allows the employer to unilaterally change the voting unit employees' terms and conditions of employment between the date of a Board-conducted representation election and the union's certification by the Board as the employees' bargaining representative. In *George Braun* the Board majority dismissed the complaint, which alleged that the employer violated Section 8(a)(5) because of its withdrawal of recognition from an incumbent union, because the evidence was sufficient to meet the standards established in *U.S. Gypsum Co.*, 157 NLRB 652 (1966), with respect to the processing of employer-filed representation petitions. *Atwood & Morrill* holds that where an otherwise lawful withdrawal of recognition occurs during the pendency of a question concerning representation raised by the filing of a decertification petition or a petition filed by a rival union, that the pendency of the question concerning representation would not preclude the *withdrawal of recognition*. In neither of these cases did the Board indicate, expressly or by implication, that between the date of a Board-conducted representation election and a union's certification by the Board as the result of that election, employers could unilaterally change their employees' terms and conditions of employment without offering the union an opportunity to bargain about those changes.

In *Ellex Transportation* the employer's employees represented by the Teamsters were covered, pursuant to a collective-bargaining agreement, under that labor organization's health and welfare fund and pension fund. Prior to the expiration of the contract a deauthorization petition was filed with the Board, and negotiations were suspended pending outcome of the deauthorization proceeding and subsequent decertification petition, which was filed with the Board after the contract expired. The Teamsters union ultimately prevailed in the decertification election and was certified by the Board. Previously, on the date the collective-bargaining contract expired, the employer ceased contributing to the health and welfare and pension funds, and, at some date thereafter, made available and implemented its own health, welfare and pension plan to the unit employees and did this unilaterally without notifying or bargaining with the Teamsters union. The complaint alleged that the employer violated Section 8(a)(5) by unilaterally instituting and implementing its own pension and health and welfare program for the unit employees. The administrative law judge, found, and a majority of the Board panel agreed that, the employer's alleged illegal unilateral conduct did not violate the Act, because the record revealed that the union had acquiesced in that conduct. In the instant case, there is no contention or evidence that Local 1095 acquiesced in any of Respondent's alleged unilateral changes in the employees' terms and conditions of employment.

It is for the above reasons that I find if, as alleged in the amended complaint, in 1984 and 1985, subsequent to the February 22, 1984 representation election, Respondent unilaterally changed the terms and conditions of employment of its motor vehicle salespersons employed at Toyota of Berkeley, that by engaging in this unilateral conduct Respondent violated Section 8(a)(5) and (1) of the Act. I shall now set forth and evaluate the evidence pertinent to these allegations, as well as the evidence pertinent to the allegations charging Respondent with acting unilaterally in 1982 during the term of its contract with Local 1095 and during 1983 prior to its December 13, 1983 withdrawal of recognition from Local 1095.

Respondent requires its salespersons to reimburse it for the damage to company-owned vehicles they drive

Since at least early in 1982 until late-January 1985 Respondent's salespersons employed at Toyota of Berkeley rented their demonstrator motor vehicles from Respondent. Pursuant to the terms of their rental agreements with Respondent, the salespersons each paid a monthly rental of $50 for the demonstrators and also agreed to pay an additional $20 a month which would be accrued by Respondent in a

collision insurance account. They further agreed, that during a 12-month period, that the first $500 in damages to their rental car would be paid out of this collision insurance accrual account and that the second $500 in damages incurred during the same 12-month period would be personally paid to Respondent by the responsible salesperson. At the end of the year, all of the money left in the above-described collision insurance accrual account was returned by Respondent to the salespersons in the form of a good driver bonus.

As indicated supra, on September 23, 1982, Respondent entered into a collective-bargaining agreement with Local 1095 covering the salespersons. It was effective from October 1, 1982, through May 31, 1983. Section 8 of the agreement provided that Respondent could make available a demonstrator automobile to each of its new car salespersons by, among other ways, renting them a current model at a monthly rental of $50, and further provided that no additional charges would be required from salespersons renting demonstrators other than the $50 monthly rental fee, and further provided

> if such a vehicle is damaged and repaired under a collision insurance policy maintained by the Employer, the salesman responsible for such damage may be charged up to a maximum of $250 under any deductible collision provision in such insurance policy.

Despite the above-described section 8 of the 1982–1983 agreement, following the execution of the agreement and throughout the term of the agreement and until late January 1985, when Respondent discontinued renting demonstrator motor vehicles to its salespersons, Respondent continued to have the salespersons sign the above-described rental agreement, whereby they agreed to contribute $20 a month into a collision insurance accrual account and agreed that the first $500 in damages to their rented demonstrator would be paid out of that account and that they would be personally liable to Respondent for the second $500 in damages during each 12-month period.

Respondent did not notify Local 1095 that it intended to maintain its existing insurance policy with respect to the salespersons' rented demonstrators, which differed substantially from its contractual obligation. Nor is there evidence that Local 1095 knew or should have known of Respondent's policy of holding its salespersons liable for more than the $250 of insurance costs set by the governing collective-bargaining agreement, or its policy of requiring the salespersons to pay $20 a month into an insurance fund.

Late in January 1985, when Respondent discontinued its policy of renting demonstrator automobiles to its salespersons, it required all of its salespersons employed at Toyota of Berkeley to agree in writing to authorize Respondent to deduct from their wages ''any damages up to $500 per occurrence, incurred while driving any company-owned vehicle.'' Respondent did not notify Local 1095 about this requirement, which was a new requirement.

The consolidated complaint, as finally amended (Tr. pp. 570–571), alleges in substance that since the effective date of its contract with Local 1095, October 1, 1982, Respondent has unilaterally changed its salespersons' terms and conditions of employment so they differed from the contractual provision which limited the salespersons' insurance liability to $250 for damaging the demonstrators they rented from Respondent. As I have found supra it is undisputed that on October 1, 1982, the date on which its collective-bargaining agreement with Local 1095 went into effect, Respondent, unilaterally and without notice to Local 1095, violated the section of the agreement which dealt with the salespersons' liability for damaging the demonstrator motor vehicles they rented from Respondent. Respondent violated the agreement by continuing to maintain its policy of requiring salespersons to pay more to Respondent for damaging the demonstrators they rented, than the $250 limit provided by the agreement, and by requiring the salespersons to pay $20 a month into an insurance fund, in violation of the parties' agreement prohibiting any charges other than the $50 monthly rental fee. I find that by engaging in this unilateral conduct, in derogation of the terms of the collective-bargaining agreement with Local 1095, Respondent violated Section 8(a)(5) and (1) of the Act.[16]

Respondent contends that it did not violate the Act by engaging in the above-described unilateral conduct because: (1) no salespersons were ever required to pay Respondent $500 for damaging a motor vehicle, inasmuch as no one ever had two accidents within the same 12-month period; (2) the policy requiring employees to pay more than $250 for damaging their rented demonstrator and to pay $20 a month into an insurance fund, which policy was maintained by Respondent after the effective date of its collective-bargaining agreement with Local 1095, was a continuation of the policy it had maintained prior to that date, thus it cannot be claimed that it constitutes a change in the employees' terms and conditions of employment; and (3) this violation is barred by the 6-month limitations proviso to Section 10(b) of the Act because Local 1095 either knew of Respondent's longstanding policy or should have known of it.[17] These contentions lack merit because: (1) although no salesperson had two accidents within the same 12-month period, so as to put that aspect of Respondent's policy to the test, it does not detract from the undisputed fact that during the time material Respondent maintained the policy and presumably would have enforced it if a situation arose warranting its enforcement; (2) that Respondent continued to maintain in effect its existing policy, following the execution of its collective-bargaining agreement, is no defense to the charge that by maintaining this policy in derogation of its agreement with Local 1095 that it violated the Act, where, as here, there is no showing that Local 1095 knew this was the case or otherwise acquiesced in Respondent's unilateral conduct; and (3) Respondent's 10(b) defense is without merit because, as I have found supra, there is no evidence Local 1095 knew or should have known of this violation more than 6 months prior to the filing of its May 25, 1984 charge in Case 32–CA–6505 alleging that, in violation of Section 8(a)(5) and (1) of the Act,

[16] Respondent's unlawful unilateral conduct of requiring the salespersons to pay $20 a month into an insurance fund was not specifically alleged as an unfair labor practice. I am persuaded that my finding concerning the illegality of that requirement does not violate principles of due process, because the record reveals that the matter was closely related to other complaint allegations and was fully and fairly litigated.

[17] Other than its conclusionary statement that ''1095 either knew of the practice or certainly should have known of it,'' Respondent points to no evidence in support of this assertion, and there is none.

Respondent failed to bargain in good faith with Local 1095 ''by unilaterally changing terms and conditions of employment.''

I further find, as contended by counsel for the General Counsel, that Respondent also violated Section 8(a)(5) and (1) of the Act, when in late January 1985, at the same time it discontinued renting demonstrator motor vehicles to its salespersons, it unilaterally, without affording Local 1095 an opportunity to bargain about the matter, instituted a policy requiring salespersons to pay Respondent for any damages, up to $500 per occurrence, incurred to company-owned vehicles they were driving.[18]

In defending against this violation Respondent argues that when in late January 1985 it had its salespersons sign agreements authorizing Respondent to deduct from their wages ''any damages up to $500 per occurrence, incurred while driving any company-owned vehicle,'' it was simply continuing its longstanding policy, in existence since at least 1982, of requiring its salespersons to reimburse Respondent for any damages, up to $500, incurred while driving any company-owned vehicle.

In support of this argument, Respondent relies upon the testimony of Mark Pagan, its former general sales manager. He testified Respondent's longstanding policy of requiring salespersons, who rented demonstrators from Respondent, to reimburse Respondent for up to $500 for damages incurred to their rented demonstrators, was not limited to only damages to a rented demonstrator, but covered damage incurred to any motor vehicle owned by Respondent being driven by a salesperson. I reject his testimony. It was contrary to the express terms of the agreements signed by the salespersons. These agreements (R. Exhs. 8–10) by their express terms obligated the salespersons to reimburse Respondent for damage done only to the specific demonstrator motor vehicles they were renting from Respondent, or a substitute rental vehicle. Respondent offered no evidence that in practice it applied the terms of those agreements to motor vehicles other than the demonstrators which were being rented to the salespersons, or evidence that Respondent otherwise had a policy, prior to January 1985, of requiring its salespersons to reimburse Respondent for up to $500 for damages incurred to any company-owned motor vehicle they were driving. Quite the opposite, the fact Respondent felt it was necessary to have its salespersons, in early 1985, agree in writing that they were obligated to reimburse Respondent for up to $500 for damages to any company motor vehicle they were driving, warrants the inference that prior to that time no such policy had been in effect, but that employees up until that time were only required to reimburse Respondent for the damage to the demonstrator motor vehicles they had been renting from Respondent. It is for all of these reasons that I reject Pagan's testimony.

[18] This violation was not alleged in the consolidated complaint, as amended, as an unfair labor practice. However, I am persuaded by that my finding of a violation does not violate principles of due process because the record reveals that the matter was closely related to other complaint allegations and was fully and fairly litigated.

Respondent requires its salespersons to attend sales meetings on their scheduled days off

Section ''5-4'' of Respondent's 1982–1983 Agreement with Local 1095 provided, in pertinent part, that ''each employee shall be permitted to take off one full day during each work week, Monday through Saturday,'' and section ''5-5'' of the agreement further provided, in pertinent part, that ''when an employee receives a day off pursuant to the provisions of this Agreement, the Employer shall not require the employee to perform any services whatsoever, including attendance at a sales meeting.'' The 1982–1983 Agreement was in effect from October 1, 1982, through May 31, 1983.

Keith Allen, a salesperson employed by Respondent from October 1983 until April 1984, testified for the General Counsel that during his entire period of employment that sales meetings were held each Saturday at 8 a.m. and attendance by the salespersons was mandatory, even for those salespersons scheduled to be off from work on Saturday. In this respect, he further testified that if salespersons scheduled to be off from work on Saturday failed to attend a weekly sales meeting, that he or she faced possible termination pursuant to Respondent's policy. Allen was not cross-examined about this testimony.

Mark Pagan, Respondent's general sales manager during the time material to this case, testified for the Respondent that it was not his policy while general sales manager to require salespersons to attend sales meetings on their days off and further testified that the only times salespersons would be asked to come to work on their scheduled days off was if there was a special event sale scheduled for that day.

Allen's testimonial demeanor, which was good, was better than Pagan's. Accordingly, I find that during Allen's tenure of employment with Respondent, October 1983 to April 1984, Respondent maintained a policy pursuant to which salespersons were required to come to Respondent's premises on their scheduled days off to attend sales meetings. The record also establishes Respondent never notified Local 1095 about this policy or otherwise afforded it an opportunity to bargain about the policy.

The complaint, as amended, alleges that ''commencing on or about November 1983, Respondent implemented a new policy requiring attendance at weekly sales meetings on employees' days off,'' and further alleges this policy was instituted without notice to Local 1095 and without affording that union an opportunity to bargain, thereby violating Section 8(a)(5) and (1) of the Act. I find this allegation has merit for the reasons below.

As I have found supra, as of May 31, 1983, the expiration date of Respondent's collective-bargaining agreement with Local 1095, Respondent was prohibited by the terms of the agreement from requiring its salespersons to attend sales meetings on their scheduled days off, and presumably complied with the terms of that agreement during its term. I also find that in compliance with settled law, Respondent, following the expiration of that agreement, was legally obligated to continue to maintain the existing conditions of employment established by the agreement, including its prohibition against requiring salespersons to attend sales meetings on

their scheduled days off.[19] However, as I have found supra, by at least October 1983 Respondent had unilaterally, without affording Local 1095 an opportunity to bargain about the matter, replaced its prior policy of not requiring salespersons to attend sales meetings on their scheduled days off, with a new policy of requiring salespersons to attend sales meetings on their scheduled days off. I find that by engaging in this unilateral conduct Respondent violated Section 8(a)(5) and (1) of the Act.

Respondent requires its salespersons to work Sunday

Section ''5-9.3'' of Respondent's 1982–1983 agreement with Local 1095 provided, in pertinent part, that ''Sunday work should not be required of any salesman,'' and section ''5-9.4'' of the Agreement, in pertinent part, provided that ''Sunday work shall be voluntary . . . (Voluntary, as used herein shall be defined as without intimidation or coercion.)'' The 1982–1983 Agreement was, by its terms, effective from October 1, 1982, through May 31, 1983.

Keith Allen, a salesperson employed by Respondent from October 1983 until April 1984, testified for the General Counsel that during his entire period of employment he was ''required'' to work Sundays. He was not cross-examined concerning this testimony.

Wade Ellery, a salesperson employed by Respondent from March 1984 to April 1985, testified for the General Counsel that during his employment from March 1984 until approximately February 1985, as a general rule, he was ''required'' to work every other Sunday and that beginning in approximately February 1985 a new work schedule was instituted, whereby the salespersons were required to work three Sundays in a row. Ellery further testified that it was his understanding that Sunday work was not voluntary. He was not cross-examined concerning his testimony.

Mark Pagan, Respondent's former general sales manager, testified for Respondent that during his tenure as general sales manager, 1982–1987, he did not have a policy of ''requiring'' salespersons to work Sunday, but that salespersons were asked if they wanted to work Sunday, which was a popular workday. He further testified that he was not able to remember any salesperson ever being disciplined for refusing to work Sunday or complaining about having to work Sunday.

Allen's testimonial demeanor, which was good, was better than Pagan's, and Allen's testimony that he was ''required'' to work Sunday was corroborated by Ellery's above-described testimony. I therefore find that during Allen's and Ellery's employment, October 1983 to March 1985, Respondent required its salespersons to work Sunday. The record also establishes Respondent never notified Local 1095 about this policy or otherwise afforded it the opportunity to bargain about the matter.

[19] The law is settled that for purposes of Sec. 8(a)(5) of the Act, the terms of a collective-bargaining agreement survive its expiration date for purposes of marking the status quo as to wages and terms and conditions of employment and that the employer must continue that status quo at least until the parties negotiate a new agreement or bargain in good faith to an impasse. *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). There is no contention or evidence that any of the alleged illegal unilateral changes which are in question in this case were privileged by an impasse in the parties' bargaining.

The complaint, as amended, alleges that ''commencing on or about November 1983, Respondent implemented a policy requiring employees to work on Sundays'' and further alleges this policy was instituted without notice to Local 1095 and without affording Local 1095 an opportunity to bargain about the matter, thereby violating Section 8(a)(5) and (1) of the Act. The allegation has merit.

As I have found supra, as of May 31, 1983, the expiration date of the Respondent's collective-bargaining agreement with Local 1095, Respondent was prohibited by the provisions of that agreement from requiring its salespersons to work on Sunday, and presumably complied with the terms of the agreement during its term. I also find, that in compliance with settled law, following the expiration of its agreement with Local 1095, Respondent was legally obligated to continue to maintain the existing conditions of employment established by the agreement, including its prohibition against requiring salespersons to work Sunday.[20] However, as I have found supra, by at least October 1983 Respondent had unilaterally, without affording Local 1095 an opportunity to bargain about the matter, replaced its policy of not requiring its salespersons to work Sunday, with a new policy requiring salespersons to work Sunday. I find that by engaging in this unilateral conduct Respondent violated Section 8(a)(5) and (1) of the Act.

Respondent exceeds the ratio of ''Beginner'' to ''Regular'' salespersons

The 1982–1983 Agreement classified Respondent's salespersons as either ''beginner'' or ''regular'' salespersons. It defined ''regular'' salespersons as all salespersons other than ''beginner'' salespersons, and defined a ''beginner'' salesperson as ''an automobile salesman who has less than six months experience in the selling or leasing of motor vehicles.'' The agreement also provided that during their first 18 months of employment, ''beginner'' salespersons could be paid less than ''regular'' salespersons, as set forth in the agreement. Lastly, section ''7-1.5'' of the agreement provided: ''The employment of beginner salesmen shall be limited as follows: Where one regular salesman is employed, one beginner salesman may be employed; for each 4 additional regular salesmen, one additional beginner salesman may be hired.''

The complaint, as amended, alleges that ''commencing in or about August 1984, Respondent exceeded the ratio of new to experienced sales people, as provided in the Agreement,'' and further alleges Respondent engaged in this conduct without notice to Local 1095 and without affording that union an opportunity to bargain about the matter, thereby violating Section 8(a)(5) and (1) of the Act. This allegation lacks merit because there is insufficient evidence to establish that commencing in or about August 1984 Respondent exceeded the ratio of ''beginner'' to ''regular'' salespersons, as provided in the 1982–1983 agreement, and, even if there was such evidence, there is a lack of evidence that this conduct constituted a unilateral change in the salespersons' terms and conditions of employment. I therefore, for these reasons, shall recommend the dismissal of this allegation.

In support of this alleged unfair labor practice, counsel for the General Counsel relies on Wade Ellery's testimony.

[20] See *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981).

Ellery, a ''beginner'' salesperson, testified for the General Counsel that during the period of August and September 1984 Respondent employed 9 or 10 salespersons at Toyota of Berkeley, and then when asked by counsel how many of those salespersons had no experience previously selling cars, testified ''probably 5.'' It is based on this testimony that counsel for the General Counsel argues, as alleged in the amended complaint, Respondent commencing in August 1984 exceeded the ratio of ''beginner'' to ''regular'' salespersons required by the 1982–1983 agreement. However, this is not necessarily so because the fact that a salesperson when initially hired may have had no prior automobile selling experience does not necessarily mean that by the time in question, August and September 1984, they had not been reclassified as ''regular'' salespersons because of superior selling performance. In any event, Ellery, a rank-and-file employee, would ordinarily not be competent to testify about the prior motor vehicles selling experience of his fellow employees, and counsel for the General Counsel made no effort to show that his testimony was based on reliable sources, i.e., company records or admissions of supervisors. Moreover, Ellery's testimony concerning the status of David Forrestall shows that it would be foolish to rely upon his testimony to determine whether salespersons were classified as ''beginner'' or ''regular'' salespersons. Ellery testified that based on his conversations with David Forrestall about Forrestall's prior experience selling motor vehicles, that Ellery had concluded Forrestall had been hired by Respondent as a ''regular'' rather than as a ''beginner'' salesperson. However, it is undisputed that Forrestall was hired by Respondent as a ''beginner,'' not as a ''regular,'' salesperson. It is for the foregoing reasons that Ellery's above-described testimony is unreliable insofar as the General Counsel has relied upon it to determine whether salespersons were ''beginner'' or ''regular'' salespersons, and because of this there is insufficient evidence to show, as contended by the General Counsel, that during the period from August to September 1984, 50 percent of Respondent's salespersons were ''beginner'' salespersons.

Even assuming, as alleged in the complaint, that commencing in or about August 1984, Respondent exceeded the ratio of ''beginner'' to ''regular'' salespersons, as provided for in the 1982–1983 agreement, there is no showing this conduct constituted a unilateral change in the employees' terms and conditions of employment. For, as the result of its lawful withdrawal of recognition from Local 1095 on December 13, 1983, Respondent at that time was privileged to unilaterally change its salespersons' terms and conditions of employment, and to continue to act unilaterally until the February 22, 1984 representation election. In view of this, there is no presumption that following its December 13, 1983 withdrawal of recognition that Respondent continued to maintain the status quo with respect to the salespersons' terms and conditions of employment in order to stay in compliance with the law. I realize that under certain circumstances once a state of affairs has been shown to exist, it is presumed that this state of affairs continues to exist. Thus, when a collective-bargaining agreement expires, it is reasonable to presume that the signatory employer will continue to maintain the terms and conditions of employment embodied in that agreement, because if the employer unilaterally changes those terms and conditions of employment he will have violated the Act. But, where, as here, an employer lawfully withdraws recognition from a union subsequent to the expiration of the parties' collective-bargaining agreement, the employer is legally free to unilaterally change his employees' existing terms and conditions of employment and because of this there is no good reason to presume that the employer will continue to abide by the terms of that agreement. It is for this reason that it was the General Counsel's burden in the instant case to demonstrate that during the period from December 13, 1983, to August 1984 that Respondent continued to maintain the terms and conditions of employment embodied in 1982–1983 Agreement. In other words, in connection with the instant allegation, the General Counsel needed to show that Respondent, during the period immediately prior to August 1984, still continued to apply the provisions of the 1982–1983 Agreement which classified persons as ''beginner'' and ''regular'' salespersons and which obligated Respondent to hire only so many ''beginner'' salespersons for every ''regular'' salesperson in its employ. There is insufficient evidence to establish this. Therefore, even if the General Counsel has proven that commencing in or about August 1984 Respondent exceeded the ratio of ''beginner'' to ''regular'' salespersons, as provided for in the 1982–1983 Agreement, such conduct would not establish Respondent had changed an existing term and condition of employment.

Respondent requires its salespersons to perform nonunit work

The complaint alleges that ''commencing on or about March 1984, Respondent has required that unit employees perform nonunit work, such as processing automobile repossessions'' and further alleges Respondent engaged in this conduct without notice to Local 1095 and without affording that union an opportunity to bargain about the matter, thereby violating Section 8(a)(5) and (1) of the Act. In support of this allegation counsel for the General Counsel relies upon the following evidence.

Section 11 of the parties' 1982–1983 Agreement effective from October 1, 1982, through May 31, 1983, reads:

> No salesman shall be expected or required to act as a collector, except in relation to deposits or down payments connected with his own sales, or carry on any other work not connected with the sale, delivery, and proper customer service with the sale and delivery of motor vehicles, accessories, etc.

Wade Ellery, employed as a salesperson at Toyota of Berkeley from March 1984 until the end of April 1985, testified that during his employment the salespersons were required to perform duties other than selling motor vehicles to customers, as follows: Required to go to the Respondent's body shop to drive new cars to the sales floor, which were in the body shop being prepared for sale; required to transport cars for other motor vehicle dealerships owned and operated by Respondent; and, required to handle certain paperwork connected with the financing of the sales transactions they were handling, namely, paperwork associated with the verification of customers' incomes and the cashing of bank drafts.

Ellery further testified that in late 1984 or early 1985 Respondent established a ''hot sheet'' program, the purpose of which was to enable its sales manager to keep track of all pending sales transactions so as to make sure that all of the steps necessary to complete those transactions were being handled in a timely fashion. If certain steps necessary to the sale had not been performed as scheduled, then the salesperson responsible for the sale was instructed by the sales manager to remedy the matter. In this regard, Ellery testified the salespersons were expected to do the following: ask customers to submit a payroll check stub so Respondent could verify their income; ask customers to furnish a pink slip showing title to his or her trade-in, or if a pink slip was unavailable have the customers fill out the appropriate paperwork and send it to the department of motor vehicles; and, to handle anything outstanding on the financing part of the transaction, such as in one instance Ellery ended up cashing one of his customer's checks to complete the sale.

Mark Pagan, Respondent's general sales manager during the time material, testified that under the ''hot sheet'' program salespersons telephoned their customers to have them furnish necessary documentation needed by the dealership to verify the customers' incomes; telephoned their customers to have them furnish ''pink slips'' they had failed to give the dealership for the cars they were trading in; and, in certain situation, when their customers failed to furnish certain income documentation as promised, the salespersons telephoned the customers to get this information. Pagan also testified that during the normal course of business salespersons went with their customers to the bank to cash certain types of checks being used by customers to buy cars.

The instant allegation, that commencing on or about March 1984 Respondent unilaterally changed the salespersons' terms and conditions of employment by requiring them to do nonbargaining unit work, is without merit because even assuming Respondent required its salespersons to perform nonbargaining unit work, as alleged, there is no evidence that by engaging in this conduct Respondent changed its salespersons' existing terms and conditions of employment. The General Counsel's contention that Respondent changed its salespersons' terms and conditions of employment is based on the presumption that following Respondent's December 1983 withdrawal of recognition from Local 1095 that Respondent continued to abide by section 11 of the parties' 1982–1983 Agreement. As I have found supra, this presumption is unreasonable. Rather, absent evidence to the contrary, it is just as reasonable to infer that subsequent to its withdrawal of recognition, Respondent no longer continued to abide by section 11 of the expired 1982–1983 Agreement. Here the record contains no evidence that following its withdrawal of recognition from Local 1095, Respondent continued to maintain as its policy what was formerly embodied in section 11 of the 1982–1983 Agreement. In any event, even if it was reasonable for the General Counsel to presume that following the December 13, 1983 withdrawal of recognition, that Respondent continued to abide by section 11 of the 1982–1983 Agreement, the evidence fails to show that commencing on or about March 1984, as alleged in the complaint, Respondent required its salespersons to perform nonbargaining unit work as defined by section 11 of the 1982–1983 Agreement. No evidence was presented to show how the parties in fact applied section 11 of the 1982–1983 Agreement and in view of that section's obvious ambiguity, I am unable to determine whether the evidence relied on by the General Counsel, set forth above, is sufficient to warrant the conclusion that Respondent during the time material required its salespersons to perform nonunit work as defined in section 11 of the 1982–1983 Agreement.

It is for the foregoing reasons that I shall recommend the dismissal of this allegation.

Respondent requires its salespersons to work the day before and the day after holidays

The complaint alleges that ''commencing on or about November 1984, Respondent discontinued accommodating the schedules of Unit employees' days off during holidays, as provided in the Agreement,'' and further alleges Respondent engaged in this conduct without notice to Local 1095 and without affording that union an opportunity to bargain about the matter, thereby violating Section 8(a)(5) and (1) of the Act. In support of this allegation, counsel for the General Counsel relies upon the following evidence.

Section ''5-3.1'' of the 1982–1983 Agreement, effective from October 1, 1982, through May 31, 1983, reads:

> The day BEFORE Thanksgiving Day and the day AFTER Thanksgiving Day shall be considered Holidays whereby one-half (1/2) of the sales crew will work one of the above days and the opposite half will work the other day. This formula will also apply to the day BEFORE Christmas Day and the day BEFORE New Years Day.

The record shows that during the weeks of Thanksgiving and Christmas in 1984 Respondent followed its normal schedule and pursuant to that schedule all of its salespersons worked the day before and after Thanksgiving and Christmas Day. The record also shows that during the week of Christmas in 1985 substantially more than one-half of the salespersons were scheduled to work the day before Christmas Day.

The General Counsel's contention that commencing on or about November 1984 Respondent unilaterally changed its salespersons' terms and conditions of employment by discontinuing giving them the day off before and after holidays, as provided in the 1982–1983 Agreement, is without merit because there is no evidence that by engaging in this conduct Respondent changed its salespersons' existing terms and conditions of employment. The General Counsel's contention that Respondent engaged in illegal unilateral conduct by having virtually all of its salespersons work their regular work schedule the day before and after Thanksgiving Day in 1984 and the day before Christmas Day in 1984 and 1985, is based on the presumption that Respondent continued to abide by section 5-3.1 of the expired 1982–1983 Agreement even after Respondent's December 13, 1983 lawful withdrawal of recognition from Local 1095. However, for the reasons set forth previously in this decision, this presumption is unreasonable and, absent evidence to the contrary, it is just as reasonable to infer that subsequent to its withdrawal of recognition Respondent no longer continued to abide by section 5-3.1 of the expired 1982–1983 Agreement. Here the record contains no evidence that subsequent to its withdrawal of recognition, Respondent continued to maintain as its policy the terms and conditions of section 5-3.1 of the parties'

1982–1983 Agreement. I therefore shall recommend the dismissal of this allegation.

Respondent prohibits its salespersons from shopping trade-ins

The complaint alleges that ''commencing on or about January 1985, Respondent prohibited Unit employees from shopping trade-ins, as provided in the Agreement,'' and further alleges Respondent engaged in this conduct without notice to Local 1095 and without affording the union an opportunity to bargain about the matter, thereby violating Section 8(a)(5) and (1) of the Act. All of the evidence pertinent to this allegation follows.

Section ''6-2'' of Respondent's 1982–1983 Agreement with Local 1095, entitled ''Shopping of Trades,'' reads:

> (6-2.1) *Before a transaction is accepted* by the Employer: A salesman shall have the right to shop any trade-in wherein he does not agree with the Employer's appraisal, without prejudice, by obtaining a bona fide wholesale cash bid from a state licensed automobile dealer on the trade-in. In the event the salesman does obtain a bona fide cash bid of at least $100 higher than the Employer's appraisal thereof, the Employer shall have the right to accept the higher wholesale cash bid at the time it is presented by the salesman, by correcting his own appraisal accordingly. . . . .
>
> (6-2.2) *After a transaction is accepted* by the Employer: The salesman shall notify the Employer promptly of his intention to shop the vehicle, and his option to shop said vehicle shall expire after 48 hours. . . . In the event the salesman does obtain a bona fide cash wholesale bid $100 or more higher than the Employer's appraisal thereof, then the salesman shall have the right to sell the motor vehicle for the amount of the higher cash bid and his commission shall be adjusted accordingly.

Wade Ellery, employed as a salesperson by Respondent from March 1984 to the end of April 1985, testified that at sales meetings held in January 1985, Respondent's sales manager' Michael Levy ''explained'' to the salespersons ''that shopping trade-ins was not acceptable policy and that if someone chose to shop a trade-in, then he would make a career adjustment for them.''[21]

Keith Allen, employed as a salesperson by Respondent from October 1983 until April 1984, when asked whether Respondent had a policy with regard to shopping trade-ins during his period of employment, testified:

> I do not recall any policy to shopping trade-ins. We were instructed to take the car to a specific used car manager and he would appraise the vehicle and that would be the set appraisal for that particular deal.

Mark Pagan, Respondent's general sales manager from 1982 until 1987, when asked by counsel for Respondent whether Respondent had a policy in favor or against its salespersons shopping a trade-in, testified ''the policy was that it was something that was available to the salespersons,'' but also testified that Respondent did not encourage its salespersons to shop trade-ins because such conduct adversely affected Respondent's profit on the resale of customers' trade-ins. Pagan further testified Respondent did not prohibit its salespersons from shopping their customers' trade-ins and denied ever telling Sales Manager Levy, ''to indicate some kind of policy or policy change regarding the shopping of the trade-in.''

Pagan's above-described testimony establishes that when Sales Manager Levy spoke to the salespersons at a sales meeting in January 1985 and prohibited them from shopping trade-ins, that Respondent's policy prior to that time had been to allow its salespersons to shop trade-ins; it had not prohibited its salespersons from engaging in this type of conduct.[22] However, in January 1985 Sales Manager Levy announced a new policy to the salespersons at one of the weekly sales meetings. As described supra, he notified them that they were prohibited from shopping a trade-in and that if they engaged in this kind of conduct they would be terminated. The record establishes that this new policy was announced without notice to Local 1095. I therefore find that Respondent changed its salespersons' existing terms and conditions of employment in January 1985, by prohibiting them from shopping trade-ins, and further find that by engaging in this conduct unilaterally, without affording Local 1095 an opportunity to bargain about the matter, Respondent violated Section 8(a)(5) and (1) of the Act.

In so concluding, I considered that Levy was not a supervisor within the meaning of Section 2(11) of the Act and considered the testimony of General Sales Manager Pagan that he never told Levy ''to indicate some kind of policy or policy change regarding the shopping of the trade-in.'' Nevertheless, I have attributed Levy's conduct to Respondent for these reasons.

An employer need not have given express authority to an individual in order to be held responsible for the individual's conduct. Under the doctrine of ''apparent authority,'' the acts of another will be attributed to the employer if a third party—here, the salespersons—could reasonably believe, on the basis of the employer's conduct, that it had consented to have a particular act done on its behalf. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Dentech Corp.*, 294 NLRB 924, 925 (1989); *Restatement (Second) of Agency*, § 27 (1958). Thus, apparent authority exists when the employer either intends ''to cause the third person to believe that the agent is authorized to act for him, or . . . should realize that his conduct is likely to create such belief.'' *Restatement (Second) of Agency*, § 27 (1958, Comment). See also *Dentech Corp.*, supra at 925. Even if the conduct of another was contrary to an employer's express instruction, the employer will be held responsible for that conduct if employees could reasonably believe that the acts were authorized. *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976). See *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir. 1971). I am persuaded that under the circumstances of this case that Levy's January 1985 announcement to the salespersons, prohibiting them from shopping trade-ins, was attributable to Respondent. In January

[21] This testimony was uncontradicted. Ellery's testimonial demeanor was good when he gave it. I therefore credit his testimony.

[22] The fact that beginner salesperson Allen, employed by Respondent for a period of 5 months in 1983–1984, did not recall this policy, does not detract from Pagan's testimony.

1985 Levy was employed by Respondent as the sales manager of Respondent's Toyota of Berkeley salespersons and was their immediate supervisor. He had occupied that position since sometime between April 1, 1984, and January 1985. As the salespersons' immediate supervisor he was responsible for conducting their weekly sales meetings. It was at those meetings that salespersons were informed about Respondent's policies and changes in those policies. They were given this information by Levy. Although Levy was not responsible for formulating Respondent's policies or the changes in its policies, it was part of his job as sales manager to speak to the salespersons at the weekly sales meetings and, on behalf of management, inform them about the Company's policies and changes in those policies. In the instant case I am persuaded that under the above-described circumstances, Levy's January 1985 announcement to the salespersons prohibiting them from shopping trade-ins, was attributable to Respondent. For, where, as here, an employer permits its sales manager to conduct employee sales meetings and also permits him, on behalf of management, to inform the salespersons at those meetings about the Company's policies and changes of policies, the employees could reasonably believe that the employer had given the sales manager the authority to make a statement prohibiting the salespersons from shopping trade-ins. Further since Respondent itself created the circumstances in which the salespersons could reasonably believe that Levy's announcement prohibiting the shopping of trade-ins was authorized, it is of no significance that, as Respondent apparently contends, it was not authorized by General Sales Manager Pagan. See *Alliance Rubber Co*., 286 NLRB 645, 645–646 (1987) (polygraph examiners who asked employees unauthorized questions about union activities were agents of employer because they acted within general scope of authority conferred on them to conduct examinations and employer should have known employees would likely believe examiners had authority to ask all questions asked).

Respondent discontinues providing demonstrator motor vehicles to its salespersons

Section 8 of Respondent's 1982–1983 Agreement with Local 1095 provided that, ''[t]he Employer shall make available to each new car salesman in his employ adequate demonstrating and transportation facilities in accordance with any one of the following plans.'' These plans, four in number, as set forth in the agreement, may be summarized as follows.

''Plan 1'' provided for Respondent to sell a current model demonstrator to its salespersons at factory cost and furnish to the salespersons, in connection with that motor vehicle, the following items free of charge each month of their employment: a cash allowance of $40 for a 4-cylinder vehicle, $50 for a 6-cylinder vehicle, and $60 for an 8-cylinder vehicle; one oil change and grease, or maintenance of the vehicle in accordance with factory recommendation; and, all reasonable mechanical upkeep.

''Plan 2'' provided for Respondent to rent to its salespersons a current model demonstrator at a monthly rental of $50 and provided that the rental fee would include all the cost of all necessary insurance. Under ''Plan 2'' the salespersons were to be furnished with the identical monthly cash allowance and maintenance as provided under ''Plan 1.''

''Plan 3'' reads as follows: ''By providing each new car salesman, without cost whatsoever to him, adequate transportation during business hours, through current models or otherwise, for his use in calling upon prospects, soliciting business, and demonstrating and selling motor vehicles. In the event the employee is assigned other than a current model under the plan, he may, at his option, avail himself of 'Plan No. 1.'''

''Plan 4'' reads as follows: ''By any other arrangement which now exists in the particular dealership involved, which, in the opinion of the employee and union, is more advantageous to the employee than either 'Plan No. 1' or 'Plan No. 2.'''

In addition to the above, section 8 of the 1982–1983 Agreement also provided that if Respondent required a salesperson to furnish his or her own automobile for company business, Respondent agreed to furnish the salesperson with the identical monthly cash allowances and monthly maintenance provided for in ''Plan 1.''

In September 1983, when Respondent entered into its 1982–1983 Agreement with Local 1095, it was renting demonstrator motor vehicles to its salespersons, in the same manner as provided for in the above-described ''Plan 2'' of the 1982–1983 Agreement. As described infra, Respondent continued to do this until January 30, 1985.

On January 30, 1985, Respondent discontinued renting demonstrator motor vehicles to its new and used car salespersons and instead, on that date, gave its salespersons the opportunity to purchase from Respondent new cars at factory cost to use as demonstrators. As part of this offer, the salespersons were required to carry certain limits of insurance designated by Respondent. In addition, Respondent offered to guarantee the financing of these motor vehicles, if they were purchased by January 30, 1985.

The record is silent as to whether or not Respondent's new demonstrator program instituted on January 30, 1985, provided for the payment of monthly cash allowances to the salespersons depending upon the number of cylinders in the demonstrator cars they purchased and whether it provided free monthly maintenance for those cars. However, the record does show that as part of this new demonstrator program, if a salesperson sold a certain number of motor vehicles a month, Respondent would pay the salesperson $250 for that month to cover the expense of not having Respondent provide a demonstrator, as it had done in the past.

In December 1984, the salespersons were notified by Respondent that it intended to discontinue renting them demonstrator motor vehicles. On December 18, 1984, Local 1095's secretary-treasurer, Salvaressa, wrote Respondent's owner that Local 1095 was ''objecting to the unilateral change made recently with the taking away of the employees' demonstrator,'' and asked that the program be reinstated and Respondent negotiate with Local 1095 concerning any future changes. Thereafter, in January 1985, prior to January 30, Salvaressa and Local 1095's business agent, Silva, met with Respondent's general sales manager, Pagan, and its labor relations consultant. Local 1095's representatives asked for a copy of Respondent's new demonstrator program, asked whether the salespersons were going to be forced to purchase demonstrators under the new program, and asked how the sales would be financed. Respondent's representatives stated they did not have a copy of the new plan to give to Local

1095 and stated the salespersons would be able to lease a motor vehicle from Respondent if they did not want to purchase one. Salvaressa asked whether Respondent had decided to take away the salespersons' demonstrators because of a ruling by the Internal Revenue Service. Pagan replied by stating that the reason Respondent had decided to discontinue making demonstrator motor vehicles available to the salespersons was because the salespersons in driving those cars had been getting into too many accidents. Salvaressa asked to see the Company's records showing the number of such accidents. Pagan refused to furnish this information. The meeting ended with Local 1095's representatives asking to see the entire package Respondent intended to offer to the salespersons to take the place of its previous rental program. Local 1095's representatives explained to Respondent's representatives that Local 1095 could not make an intelligent decision about the matter until they were informed about the new program in its entirety. However, Respondent went ahead on January 30, 1985, and, as described supra, implemented its new demonstrator program, without any further communication with Local 1095.

The complaint, as amended, alleges that ''commencing on or about January 31, 1985, Respondent discontinued its policy of providing demonstrator vehicles to salespersons'' and further alleges Respondent engaged in this conduct without notice to Local 1095 and without affording Local 1095 an opportunity to bargain about the matter, thereby violating Section 8(a)(5) and (1) of the Act. This allegation has merit.

As described supra, during the time material Respondent rented demonstrator motor vehicles to its salespersons, but on January 30, 1985, without giving Local 1095 an opportunity to bargain, discontinued its policy of renting demonstrator motor vehicles to its salespersons and instead substituted a new demonstrator program whereby the salespersons would be able to purchase their demonstrator motor vehicles from Respondent at factory cost. Having found supra, that at this time Respondent was obliged to bargain with Local 1095 before making any unilateral changes in its salespersons' existing terms and conditions of employment, I further find that, as alleged in the complaint, by unilaterally discontinuing its policy of renting demonstrator motor vehicles to its salespersons on January 30, 1985, that Respondent violated Section 8(a)(5) and (1) of the Act.

In so concluding I considered Respondent's contention that it did not act unilaterally by engaging in this conduct, ''because there was no evidence showing that the replacement program or [Respondent's] policies violated any of the plans permitted under section 8 of the [1982–1983 Agreement].'' In other words, Respondent argues that by virtue of the provisions contained in the 1982–1983 Agreement whereby Local 1095 agreed that one of the ways Respondent could make demonstrator motor vehicles available to its salespersons was by affording them the opportunity to purchase such vehicles from Respondent at factory cost, that Local 1095 waived its statutory right to bargain about the new program. This argument assumes Local 1095, as of January 1985, was bound by the terms of section 8 of the expired 1982–1983 Agreement. I am persuaded this was not so because, as described supra, on December 13, 1983, after the expiration of the 1982–1983 Agreement, Respondent lawfully withdrew recognition from Local 1095 and as of that date was no longer legally obligated to abide by the terms and conditions established by the 1982–1983 Agreement.[23] Local 1095, in view of this, was likewise no longer bound by the provisions of the 1982–1983 Agreement. To hold otherwise would be inequitable. It is for this reason that I reject Respondent's waiver argument.

Respondent reduces the rate of commission for new salespersons

The 1982–1983 Agreement between Respondent and Local 1095 classified salespersons as either ''beginner'' or ''regular'' salespersons. It defined ''regular'' salespersons as all salespersons other than ''beginner'' salespersons, and defined a ''beginner'' salesperson as ''an automobile salesman who has less than six months experience in the selling or leasing of motor vehicles.''

Section 6 of the Agreement provided that the ''commission on new vehicles shall be computed on the basis of 35% of gross profit in the deal'' and that ''the regular commission on used motor vehicles shall be 30% of the gross profit.'' These provisions applied to the salespersons classified as ''regular'' salespersons. They did not apply to the salespersons classified as ''beginner'' salespersons. Rather, the agreement provided that during their first 18 months of employment, salespersons classified as ''beginner'' salespersons could be paid less than the ''regular'' salespersons. In this regard, section 7 of the agreement provided that during the first 6 months of their employment ''beginner'' salespersons ''shall receive not less than 50% of a regular commission,'' and during the second 6 months ''shall receive not less than 65% of a regular commission,'' and during their third 6 months of employment ''shall receive not less than 80% of a regular commission.'' The agreement also provided that the balance ''of the above regular commissions'' shall be paid to the ''regular'' salespersons who assisted the ''beginner'' in the close of the sale or lease of the motor vehicles, and that ''beginner'' salesperson could advance to the status of a ''regular'' salesperson at any time, but in no event would a salesperson be classified as a ''beginner'' for more than 18 months.

The record establishes that following the expiration of the 1982–1983 Agreement on May 31, 1983, that, as provided in the 1982–1983 Agreement, Respondent as a rule continued to pay its experienced salespersons 35 percent of the gross profit for selling a new motor vehicle and 30 percent of the gross profit for selling a used motor vehicle.

It is also clear that starting in late June 1983 and continuing to the time material that newly hired salespersons, who were without prior experience selling motor vehicles, but who had been hired after completing Respondent's 6-week training program, were compensated by Respondent pursuant to the following policy: during their first 3 months of employment they were classified as ''apprentice 1'' and their net commission per sale was computed at the rate of 26.25

[23] As I have found supra, because of the ultimate result of the February 22, 1984 representation election, as of that date, Respondent was obligated to bargain with Local 1095 before it made any unilateral changes in its salespersons' existing terms and conditions of employment. However, as I have also found supra, because of Respondent's previous lawful withdrawal of recognition, it could not be presumed that the salespersons' existing terms and conditions of employment were the same as had been embodied in the 1982–1983 Agreement.

percent of Respondent's gross profit; during the next 3 months they were classified as ''apprentice 2'' and their net commission per sale was computed at 29.75 percent of Respondent's gross profit; at the end of 6 months they were classified as ''journeyman 1'' and their net commission per sale was computed at 35 percent of Respondent's gross profit, minus $20; at the end of 1 year they were classified as ''journeyman 2'' and their net commission per sale was computed at the rate of 35 percent of Respondent's gross profit, minus $15; and, at the end of 18 months they were classified as ''salesman'' and their net commission per sale computed at the rate of $35 of Respondent's gross profit, less $10.

The record reveals that even after instituting its above-described compensation policy for the salespersons hired after completing its 6-week training program, that Respondent continued to hire inexperienced salespersons who had not taken this training program. The record does not show whether it was Respondent's policy to treat this group of hires in the same manner as it had been required to compensate ''beginner'' salespersons under the terms of the 1982–1983 Agreement. Also, there is no evidence of Respondent's compensation policy toward this group of salespersons, subsequent to its institution of the compensation program for the graduates of its training school.[24]

The complaint, as amended, alleges that ''commencing on or about March 1 1985, Respondent reduced the rate of commission for new salespersons from 35% to 25%,'' and further alleges Respondent engaged in this conduct without notice to Local 1095 and without affording that union an opportunity to bargain about the reduction, thereby violating Section 8(a)(5) and (1) of the Act. In support of this allegation counsel for the General Counsel in her posthearing brief relied upon the following evidence.

The commission vouchers maintained by Respondent for the 13 salespersons it employed in February 1985, show 2 of them received commission of less than 35 percent: Forrestall received a commission of 25 percent of Respondent's gross profit on each of his three sales;[25] and Brown received a commission of 30 percent of Respondent's gross profit for 5 of his 10 sales.[26]

The commission vouchers maintained by Respondent for the 17 salespersons it employed in March 1985, show that 7 of them received commission of less than 35 percent: Purdy, Hughes, Forrestall, and Aust received commissions of 25 percent of Respondent's gross profit on all of their sales;[27] and Brown, Selinsky, and Russell received commissions of 30 percent of Respondent's gross profit on all of their sales.[28]

The commission vouchers maintained by Respondent for the 15 salespersons employed during April 1985, show 9 of them received commissions of less than 35 percent: Botelho, Aust, Hughes, Purdy, Forrestall, and Morton received commission of 25 percent of Respondent's gross profit on all of their sales;[29] and, Russell, Selinsky, and Brown received commissions of 30 percent of Respondent's gross profit on all of their sales.[30]

The commission vouchers maintained by Respondent for the 20 salespersons employed during May 1985, show 12 of them received commissions of less than 35 percent: Botelho, Hughes, Purdy, Hedrick, Forrestall, Aust, Semper, Eversley, Burleigh, and Coerper received commissions of 25 percent of Respondent's gross profits on all of their sales;[31] and Russell and Selinsky received commissions of 30 percent of Respondent's gross profit on all of their sales.[32]

The above-described evidence, relied on by the General Counsel, fails to prove, as alleged in the complaint, that ''commencing on or about March 1, 1985, Respondent reduced the rate of commission for new salespersons from 35% to 25%.'' I have reached this conclusion for these reasons.

If by ''new salespersons'' the complaint allegation is referring to the inexperienced salespersons whom Respondent classified as ''beginner'' salespersons or to those inexperienced salespersons hired by Respondent after having attended Respondent's training school, the allegation makes no sense because Respondent was never obligated to compute the commissions of those salespersons at the 35-percent rate. For, under the commission rates set by the 1982–1983 Agreement and under the commission rates set by Respondent in conjunction with its training program, Respondent was perfectly justified in computing these salespersons' commission at the 25-percent rate.

If by its reference to ''new salespersons,'' the complaint allegation means to say that commencing on or about March 1, 1985, Respondent divided its experienced motor vehicle salespersons into two groups, one group whom it continued

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[24] The testimony of Respondent's former general sales manager Pagan, was unreliable when he testified about the rate of commission paid by Respondent to the inexperienced salespersons who did not attend Respondent's training school, inasmuch as it was clear that his memory had been dimmed by the passage of time, in particular by the fact he was being asked to testify about a matter which occurred at least 5 years prior to his testimony and by the fact that he had not even been employed by Respondent for the past 3 years (see Tr. pp. 476–477).

[25] Respondent hired Forrestall early in 1985. He was classified as a ''beginner'' salesperson and did not, prior to his hire, attend Respondent's training school.

[26] Each of Brown's 30-percent commissions involved the sale of a used car.

[27] The record does not reveal whether Purdy, Hughes, or Aust were experienced automobile salespersons or how they were classified by Respondent. As noted supra, Forrestall had little experience as an automobile salesperson and was classified as a ''beginner'' salesperson.

[28] Each of the sales for which Brown, Selinsky, and Russell received a 30-percent sales commission involved the sale of a used motor vehicle.

[29] Except for Forrestall, supra, the record does not reveal whether any of these salespersons were experienced salespersons or how they were classified by Respondent.

[30] Each of the sales for which Brown, Selinsky, and Russell received a 30-percent sales commission involved the sale of a used car.

[31] Except for Forrestall, supra, the record does not reveal whether Respondent regarded any of these salespersons as experienced salespersons for purposes of computing their rate of commission. Except for Forrestall, supra, and Hedrick, Eversley, Burleigh, and Coerper, the record does not reveal whether any of these salespersons were experienced motor vehicle salespersons. As to Eversley, Burleigh, and Coerper, the record indicates they had only recently been hired by Respondent and were without prior motor vehicle sales experience (G.C. Exhs. 5(d)–(f)). As to Hedrick, the record indicates he was hired in May 1985 and had prior experience as a motor vehicle salesperson (G.C. Exh. 5(q)).

[32] Russell's and Selinsky's sales each involved the sale of a used car.

to pay commissions computed at the 35-percent rate and the other group of more recently employed salespersons, whom it paid commissions at the reduced 25-percent rate, there is not a scintilla of evidence to support this contention.

The sole indication in this record that any of Respondent's experienced automobile salespersons were paid less than the 35-percent commission rate paid by Respondent to its experienced automobile salespersons is the evidence concerning salesperson Hedrick, who, was hired in May 1985 and later during that month split two sales with other salespersons for which they shared a 25-percent commission. Hedrick's employment application indicates he was an experienced motor vehicle salesperson, but there is no evidence Respondent, after checking out his alleged employment experience, considered him as experienced for compensation purposes. In any event, this isolated episode involving one salesperson, who had only been employed for less than 1 month and had only sold two motor vehicles, both in conjunction with other salespersons, is too thin a reed upon which to support the instant allegation.

It is for the above reasons that I find the General Counsel has not established that Respondent reduced the rate of commission for ''new'' salespersons from 35 percent to 25 percent. I therefore shall recommend that this allegation be dismissed.

E. *The Refusal to Furnish Information*

Respondent's 1982–1983 Agreement with Local 1095 contained a grievance procedure ending in binding impartial arbitration, which covered grievances protesting employees' discharges. During the term of the agreement Respondent discharged salespersons Floyd Johnson, William Eckels, and Edward Fontes on December 2, 1982, December 6, 1982, and February 9, 1983, respectively. Local 1095, pursuant to the agreement's grievance machinery and during the term of the agreement, filed grievances protesting their discharges. As described infra, these grievances were presented to arbitrators who issued awards calling for reinstatement and backpay, which Respondent contested in court.

Johnson's and Eckels' awards

In the matter of Johnson's grievance, on May 25, 1984, Arbitrator William Eaton issued an award calling for his reinstatement and backpay. Thereafter, when they could not agree upon the amount of backpay due under the award, the parties litigated this matter in April 1988 before Arbitrator Eaton, who, subsequently awarded Johnson $32,236.54. Respondent filed a motion to vacate the award with the United States District Court for the Northern District of California. It was heard by Judge J. P. Vukasin Jr. who, on October 30, 1989, issued an order vacating the award.

In the matter of Eckels' grievance, on August 21, 1986, Arbitrator Julius Draznin issued an award calling for his reinstatement and backpay. Thereafter, when they could not reach agreement upon the amount of backpay due under the award, the parties litigated this matter in February and March 1988 before Arbitrator Draznin, who, on April 11, 1988, awarded Eckels $150,417 in backpay. Respondent filed a motion to vacate the award with the United States District for the Northern District of California. It was heard by Judge J.P. Vukasin Jr. who, on May 16, 1989, issued an order vacating the award.

The sections of the 1982–1983 Agreement considered by the arbitrators and Judge Vukasin in evaluating the grievants' backpay claims, are as follows.

> Section 17. Board of Adjustment:
>
> . . . .
>
> (17-7.5) Employer liability for any claim for back wages shall be limited to the amount of wages the employee would have been entitled as outlined in Section 6-3 of the Agreement, less any unemployment compensation entitlement or other compensation for personal services received from any source during the period involved in the dispute;
>
> Section 6. Computation of Commissions
>
> . . . .
>
> (6-3) Minimum Monthly Income: For each calendar month commencing October 1, 1982, and ending May 31, 1983, each regular salesman shall be guaranteed a minimum of eight hundred dollars ($800.00) remuneration, and shall be paid the same in semimonthly installments of four hundred dollars ($400.00) on the fifteenth and the last day of each month, respectively, as an advance against that month's commissions. Accordingly, at the end of each calendar month, the Employer shall total the commissions earned by and/or owing to each salesman during said calendar month and shall thereupon, within five (5) days, pay the salesman the said commissions, less the eight hundred dollars ($800.00), but if such employee's said commissions aggregated less than eight hundred dollars ($800.00) then, beginning with the first day of that month, a three months' wipe-off period shall commence. During this wipe-off period the Employer shall advance and pay to such employee a sum sufficient to raise the amount of earned commission to eight hundred dollars ($800.00) for each month, so that, for the three months' wipe-off period, such employee shall receive in the aggregate the total of his earned commissions during the three months, or twenty-four hundred dollars ($2,400.00) whichever is the greater; provided however, that if the earned commissions in the second month of such wipe-off period when added to the earned commissions of the first month, aggregate sixteen hundred dollars ($1,600.00) or more, then the wipe-off period shall cease at the end of the second month, and for each such two-month period, the employee shall receive the total of his earned commissions during the two months, or sixteen hundred dollars ($1,600.00) whichever is the greater.
>
> Section 14. Claims Limitations—Stale Claim Clause
>
> (14-1) No claims by a salesman for remuneration under Section 6 of the Agreement shall be valid as to any period of time in excess of sixty (60) days prior to the time such claim is made in writing to the Employer by the salesman or the Union. If it is determined under the grievance procedure in Section 17 of the Agreement that the Employer has violated Section 6 with respect to such claim for a period in excess of sixty (60) days the Employer shall be subject to liquidated damages. In view of the difficulty of

ascertaining the exact amount of damages suffered by the Union and the remaining Employer parties to the Agreement as a result of such violation, it is agreed that the following schedule of liquidated damages shall apply, and that such damages shall be paid to the Board of Adjustment:

Period of Violation In Excess of 60 Days	*Amount of Liquidated Damages*
Up to 3 months	$250
3 to 6 months	500
6 to 12 months	1000
12 to 18 months	1500
18 to 24 months	2000

(14-2) For the purposes of determining the amount of liquidated damages owed under the foregoing schedule, a single arrangement, plan, scheme or method in violation of the compensation provisions of this Agreement which involves more than one salesman during a continuous period of time shall be considered a single violation.

(14-3) Payments of such liquidated damages shall be applied by the Board of Adjustment to such purposes as it shall determine to be appropriate in the circumstances of the particular case, but in no event shall such monies be paid to the claimant, or returned to the Employer guilty of the violation.

In vacating the arbitrators' backpay awards in Johnson's and Eckels' cases, Judge Vukasin concluded that the arbitrators ignored the express limits on their authority to award backpay found in section 17 of the 1982–1983 Agreement, and ignored the time limits and amounts of section 6-3, and ignored the cap on liquidated damages found in section 14, and reasoned that section 17 and section 6-3 of the agreement, when considered together, authorized an arbitrator to award backpay for the period beginning October 1, 1982, and ending May 31, 1983, and guaranteed wages of only $800 per month for that period, and that section 14 of the 1982–1983 Agreement set a maximum cap on liability of $2000 in liquidated damages, and ultimately concluded that Eckels' and Johnson's backpay claims were subject to the $2000 cap set for liquidated damages. Local 1095 appealed Judge Vukasin's orders vacating the arbitrators' backpay awards for Johnson and Eckels and its appeals are currently pending before the Court of Appeals for the Ninth Circuit.

Arbitrator Draznin's reasoning, rejected by Judge Vukasin, follows (G.C. Exh. 44):

> The language of the Section in part (6-3) and in its entirety relates only to the computation of commissions and the auto sales personnel guaranteed monthly draw against ''that month's commissions.'' In no way does Section 6-3 impact upon or relate to the issues and subject area involved in the discipline invoked against Eckles. The inclusion of a reference to section 6-3 in section 17-7.5 would appear to again relate to the computation of wages due pursuant the ''Computation of Commissions'' provisions of the Contract and therefore would not be considered applicable here. In any event the language of section 6 and its 6-3 relates to earnings and minimums for said earnings. Since Eckles, at the time of his discharge by the Company, was earning more than the minimums cited in Article 6-3, that article cannot be controlling here as the Employer argues. I am aware of the fact that auto salespersons' income will fluctuate from time to time, but for purposes of any proceedings such as this one, the only logical course and certainly the most equitable one, in my opinion, is to carry forward a projection of Eckles' earnings while he was employed, for the ensuing time period following his discharge up to the time of his reinstatement.
>
> The language of Article 14 which is titled ''Claims Limitation-Stale Claims Clause'' clearly incorporates section 6 into its standing in the Contract. Again section 14, as well as section 6, deal only with the ''Computation of Commissions'' and the issues related thereto arising out of the possible Employer's violations of section 6 and therefore not related in any way whatsoever to the issue at hand in the instant case. Therefore, section 14 and the ''liquidated damages'' provisions cited by the Employer are totally inappropriate here.

Fontes' award

In the matter of Fontes' grievance, on September 23, 1986, Arbitrator Joe Henderson issued an award calling for his reinstatement and backpay. Thereafter, Respondent filed a motion to vacate the award with the United States District Court for the Northern District of California. It was heard by Judge J. P. Vukasin Jr. who, on May 15, 1989, issued an order denying Respondent's motion to vacate the award and a further order remanding the matter to a new and different arbitrator for the purpose of considering the issue of the amount of backpay due Fontes. As of the date of the hearing in the instant unfair labor practice proceeding, the parties were in the process of selecting an arbitrator to decide the question of the amount of backpay due Fontes.

Local 1095's requests for Information

On January 22, 1986, Local 1095's president wrote a representative of Respondent and requested that Local 1095 be allowed to examine certain payroll records in order to determine the amount of backpay Respondent owed Eckels.[33] The letter reads as follows:

> Automobile Salesmen's Union, Local 1095 is requesting to examine Toyota of Berkeley pay records from November 1982 thru January 1986, to determine how much back pay Mr. William Echels [sic] should have coming. By examining these records will show what Mr. Echels could have made.
>
> Local 1095 estimates his back pay thru January 1986 to be One Hundred Six Thousand Ninety Three Dollars and Thirty Seven Cents ($106,093.37), this figure does not include his Health and Welfare claims or any Pension contributions due him, these figures will be submitted at a latter date.

[33] Local 1095's President, Salvaressa, testified he sent this letter because Local 1095 had submitted Eckels' discharge grievance to arbitration and, if the grievance was found to have merit, Local 1095 wanted to have some idea of the backpay involved.

> If you have any questions regarding this matter, please contact our office or Mr. David Rosenfeld, Esq.

Respondent did not answer this letter.

In September 1987 Local 1095's Attorney David Rosenfeld asked Respondent's Attorney John Bobay what Floyd Johnson's ''compensation package'' would be if Johnson accepted Attorney Bobay's August 27, 1987 offer of reinstatement. Attorney Bobay responded by letter dated September 8, 1987, in which he explained that if Johnson accepted Respondent's offer of reinstatement he would be employed at the same location as he had been when he was discharged and would receive the same ''remuneration'' as he had been receiving at the time of his discharge in 1982. Attorney Rosenfeld replied by letter to Attorney Bobay, dated September 16, 1987, which reads as follows.

> Your letter of September 8, 1987, is inadequate. Please specify the compensation package including health and welfare and pension or the equivalent you are offering Mr. Johnson. Please also give us the hours and type of work involved. Also, would you please provide us with the hours, wages and conditions applicable to all salesmen to insure that Mr. Johnson is being treated equitably. No. 1095 remains the bargaining representative and should you fail to provide this information, we will take the position with the arbitrator that you have not told your Back Pay liability.

Attorney Bobay responded by letter dated September 24, 1987, which stated that after reviewing Attorney Rosenfeld's letter of September 16, 1987, he concluded that Attorney Rosenfeld was ''simply playing games with [Respondent]'' and stated if Attorney Rosenfeld ''had been serious about pursuing the offer of reinstatement [he] would have had Mr. Johnson speak with [Respondent's owner] directly as suggested in the August 27 offer.''[34] Respondent did not give Attorney Rosenfeld or Local 1095 the information requested in Attorney Rosenfeld's letter of September 16, 1987.

On January 12, 1988, Attorney Rosenfeld, on behalf of Local 1095, wrote Respondent's Attorney, John Bobay, the following letter:

> Now that the court's have enforced all three arbitration awards, it is imperative that Toyota of Berkeley permit Local 1095 to examine all records of salesmen compensation from July, 1983 to the present. We need those records in order to evaluate the amount of back pay owed the three grievants (Johnson, Eckles, and Fontes). If you fail to agree upon a date when we can inspect those records, we will simply have to include that in Charges before the Labor Board.

Respondent did not furnish to Attorney Rosenfeld or Local 1095 the information requested in the January 12, 1988 letter.

The applicable law

The complaint alleges Respondent refused to bargain with Local 1095 within the meaning of Section 8(a)(5) of the Act when it failed and refused to furnish Local 1095 the information requested in Local 1095's above-described letters of January 22, 1986, September 16, 1987, and January 12, 1988. This allegation has merit for the reasons below.

An employer has an obligation under Section 8(a)(5) of the Act to furnish its employees' bargaining representative with requested information that is relevant and necessary to the representative's effective performance of its collective-bargaining responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–437 (1967). This obligation extends to a union's request for information in connection with grievance proceedings under a collective-bargaining agreement (id. at 438–439), and does not terminate when the grievance has been taken to arbitration. *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633 (2d Cir. 1982); *Fawcett Printing*, 201 NLRB 964, 972–973 (1973); *Kroger Co.*, 226 NLRB 512 (1976).

The threshold question in determining whether an employer must provide information is ''always one of relevance.'' *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). The standard for determining whether information is relevant is a liberal ''discovery type standard,'' and the question is only whether there is a ''probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co.*, supra at 437. Once this initial showing of relevance has been made, ''the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information.'' *San Diego Newspaper Guild v. NLRB*, supra at 867.

Where, as here, the information sought by Local 1095 directly relates to the employment conditions of bargaining unit employees, the information is deemed presumptively relevant. *NLRB v. Whitin Machine Works*, 217 F.2d 593, 594 (4th Cir. 1954). An employer can rebut that presumption by demonstrating the information actually is being sought for an improper purpose. *NLRB v. A. S. Abell*, 624 F.2d 506, 510 (4th Cir. 1980); *NLRB v. Associated General Contractors*, 633 F.2d 766, 770 (9th Cir. 1980); *Chemical Workers Local 6-418 v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983). The presumption cannot be rebutted, however, by attempting to demonstrate that the requested information could not alone substantiate a grievance under the parties' contract or that a grievance would not ultimately be upheld by an arbitrator. See *NLRB v. Acme Industrial Co.*, supra at 437; *NLRB v. Safeway Stores*, 622 F.2d 425, 428 (9th Cir. 1980).

Analysis and Conclusions

The information requested by Local 1095 on September 16, 1987, was relevant to Local 1095's performance of its duties as grievant Johnson's representative in the processing

[34] Attorney Rosenfeld testified his reason for requesting the information asked for in his September 16, 1987 letter was that there had been an arbitration award issued which called for Johnson's reinstatement and Respondent, through its attorney, indicated it was offering Johnson his job back, so Local 1095 wanted to know the circumstances of his reinstatement. His reason for asking Respondent to provide Local 1095 with the hours, wages and working conditions of the other salespersons, Attorney Rosenfeld testified, was Local 1095 wanted to be sure Johnson was being reinstated pursuant to Respondent's 1987 terms and conditions of employment and not, as had been indicated by Attorney Bobay, pursuant to the terms and conditions which existed 5 years earlier, when he was discharged.

of his discharge grievance. The requested information was germane to the issue of whether Respondent's offer to reinstate Johnson fulfilled its reinstatement obligation under the arbitrator's award. The requested information was reasonably calculated to reveal the existing terms and conditions of employment of Respondent's current salespersons and if it revealed to Local 1095 that their terms and conditions of employment had improved substantially since Johnson's 1982 discharge, then Local 1095 would be in a position to contend, before the arbitrator, that Respondent's offer to reinstate Johnson with the same ''remuneration'' as he had received in 1982, did not constitute a valid offer of reinstatement. Under the circumstances, by its refusal to furnish to Local 1095 the information requested in Attorney Rosenfeld's September 16, 1987 letter to Attorney Bobay, Respondent violated Section 8(a)(5) and (1) of the Act.

The information requested by Local 1095 on January 22, 1986, was relevant to Local 1095's performance of its duties as grievant Eckels' representative in the processing of his discharge grievance. The requested information was germane to the issue of the amount of backpay Eckels was entitled to as the result of his alleged wrongful discharge. I realize that when Local 1095 requested this information, Eckels' grievance had only been submitted to arbitration and that it had not as yet been heard by an arbitrator. Nonetheless, it was necessary at that time for Local 1095, as Eckels' grievance representative, to arrive at a reasonable estimate of Eckels' potential backpay, so as to intelligently formulate a settlement offer, in an effort to avoid the risk of arbitration. In performing its duties as Eckels' grievance representative Local 1095 was obligated to evaluate the prospects for a compromise settlement before, as well as during and after, the case had been presented to an arbitrator for decision. It is for this reason that on January 22, 1986, Local 1095 was entitled to see Respondent's ''pay records from November 1982 through January 1986, to determine how much backpay William Eckels should have coming.''[35] In view of this, by its refusal to furnish Local 1095 with the information which was requested in Local 1095's January 22, 1986 letter to Respondent's representative, Respondent violated Section 8(a)(5) and (1) of the Act.

The information requested by Local 1095 on January 12, 1988, was relevant to the performance of its duty as the representative of grievants Johnson, Eckels, and Fontes in the processing of the grievances protesting their discharges. The requested information was germane to the issue of the amount of backpay each of the grievants was entitled to receive pursuant to the arbitrators' backpay awards. By January 12, 1988, the arbitrators in the cases of all three of the grievants had issued awards directing that they were to be reinstated with backpay, and Local 1095 was getting ready to submit their backpay claims to the arbitrators. In preparing to do this, as explained in its January 12, 1988 information request, Local 1095 needed ''to examine all records of salesmen compensation from July 1983 to the present . . . in order to evaluate the amount of backpay owed to the three grievants.'' Local 1095 needed this information to intelligently formulate the grievants' backpay claims, to present their backpay claims to the respective arbitrators, to assist the arbitrators in determining the Respondent's backpay obligation, and to intelligently assess the prospects for a compromise or settlement prior to or during the hearings before the arbitrator concerning the backpay claims. It is for these reasons that on January 12, 1988, Local 1095 was entitled to examine the compensation records of Respondent's salespersons employed from July 1983 to January 12, 1988, for the purpose of determining the amount of backpay owed to grievants Johnson, Eckels, and Fontes, pursuant to the arbitrators' reinstatement and backpay awards.[36] In view of this, Respondent violated Section 8(a)(5) and (1) of the Act when it refused to furnish Local 1095 with the information which was requested in Attorney Rosenfeld's January 12, 1988 letter to Attorney Bobay.[37]

In its posthearing brief Respondent argues that its refusal to furnish Local 1095 with the information requested in Attorney Rosenfeld's letters of January 22, 1986, and January 12, 1988, was justified for the following reasons:[38] Local 1095 waived its statutory right to the information by failing to ask the arbitrators to compel Respondent to furnish the information and by otherwise failing to raise this issue with either the arbitrators or Judge Vukasin; the information was not necessary or relevant to the processing of the grievants' backpay claims because the governing collective-bargaining agreement limits the grievants' backpay to $2000 per grievant; and, the requests for the information are premature because the arbitrators' backpay awards have been vacated by Judge Vukasin. These arguments lack merit.

[35] The record shows that Eckels had not been reinstated as of January 1986. I also note, as discussed infra, that Local 1095 was using a reasonable method of computation when it asked to see the earning records of the other salespersons employed during Eckels' alleged backpay period for the purpose of estimating Eckels' potential backpay.

[36] In asking for the compensation records of the salespersons employed by Respondent, Local 1095 intended to use a reasonable method to compute the grievants' backpay. Thus, in arriving at a gross backpay figure for each of the grievants, it was necessary for Local 1095 to determine their probable earnings during the backpay period had they not been wrongfully discharged. Since such an inquiry requires a hypothetical reconstruction of past events, the backpay projection is but an approximation of the true amount. One of the standard methods used to compute backpay in such a situation, especially where, as here, the compensation of the workers involved is based on incentive earnings, is known as the representative employees method. Pursuant to this method, the grievants' backpay is computed by using the earnings of a group of employees employed during the alleged backpay period to estimate the grievants' loss of earnings. However, to use this formula it was first necessary for Local 1095 to examine the compensation records of the salespersons employed by Respondent during the alleged backpay period.

[37] The record shows that as of January 1988 Eckels had not been offered reinstatement, as required by the arbitrator's reinstatement award. The record does not reveal whether Johnson or Fontes, as of January 1988, had been offered reinstatement as required by the arbitrators' reinstatement awards. However, since the information requested by Local 1095 concerning Johnson's and Fontes' backpay claims was presumptively relevant, if Respondent intended to justify its refusal to furnish the information on the basis that Johnson's and Fontes' backpay periods had been tolled prior to January 1988 by offers of reinstatement, the burden was on Respondent to prove this. In any event, since the record shows that Eckels had not been offered reinstatement as required by the arbitrator's award, such a defense would be without merit in his case.

[38] Respondent offers no justification for its refusal to furnish the information requested by Local 1095 in its September 16, 1987 information request.

I can find no legal authority, and Respondent has cited none, to support the novel proposition that a union waives its statutory right to information, in connection with processing a grievance under a collective-bargaining agreement, by failing to ask an arbitrator or a court to compel the union to furnish the requested information. In fact, this contention borders on the frivolous where, as here, there is no provision in the governing collective-bargaining agreement which obligates Respondent to furnish Local 1095 with information in connection with the administration of the agreement. Respondent's further contentions, however, which are based on Judge Vukasin's interpretation of the governing collective-bargaining agreement, raise difficult questions.

As described supra, Judge Vukasin vacated the backpay awards issued by Arbitrators Eaton and Draznin in the cases involving Johnson's and Eckels' grievances, because he concluded that the arbitrators had ignored the express terms of the governing collective-bargaining agreement which, as interpreted by Judge Vukasin, limited the grievants' backpay to no more than $2000.[39] Local 1095, as noted supra, has appealed Judge Vukasin's decisions. However, if the Court of Appeals rejects Local 1095's appeals, Local 1095's request for the compensation records of Respondent's salespersons, which were based on an alleged backpay period of several years duration, will have no possible relevance to the grievants' backpay claims inasmuch as their backpay claims will be limited to $2000. Therefore, Respondent argues that the requested information has no probable relevance to the grievants' backpay claims, and for this reason its refusal to furnish the requested information did not constitute a violation of the Act. I disagree.

The law is settled that the merits of an unfrivolous grievance need not be resolved as a predicate to the Board's ''acting upon the probability that the desired information was relevant.'' *NLRB v. Acme Industrial Co.*, supra at 437. In this regard, in *NLRB v. Safeway Stores*, supra at 428–430, the court held that a union's statutory right to information relevant to a grievance that is not on its face frivolous, cannot be defeated by an argument that an employee's conduct is nongrievable. See also *NLRB v. Davol, Inc.*, 597 F.2d 782, 786–787 (1st Cir. 1979). Any other rule would place unions in the position of having to litigate questions going to the merits of their claims as a predicate to being able to secure information which could obviate the need for such litigation in the first instance, and would also place the Board in the role which the Board should avoid, namely the role of deciding contractual questions which are best left to the arbitrator who has to rule on the underlying grievance. I am of the opinion that the above-described principles govern the instant situation. I recognize that the request for information here did not arise in the context of an employer's contention that it was justified in refusing to provide information because the employee grievance involved was nongrievable under the governing collective-bargaining agreement. Rather, it arose in the context of an employer's contention that a union did not need the information it had requested to process a grievant's backpay claim, because under the employer's interpretation of the governing agreement, the requested information was irrelevant to the grievant's backpay claim. Nonetheless, where, as here, Local 1095's interpretation of the collective-bargaining agreement is not unreasonable,[40] I am persuaded that the above principles, enunciated by the Supreme Court and the courts of appeals in *Acme*, *Safeway*, and *Davol*, govern. The dispute underlying the instant unfair labor practice proceeding is *not* whether the governing collective-bargaining agreement limited Respondent's backpay liability to not more than $2000, as contended by Respondent, or, as contended by Local 1095, obligated Respondent to pay the grievants for their loss of earnings from the date of their discharges until Respondent offered them reinstatement. For, as indicated supra, when deciding whether an employer has a duty to furnish information, the Board does not pass on the merits of the underlying contractual dispute in reference to which the information is sought. *NLRB v. Acme Industrial Co.*, supra at 437; *NLRB v. Davol, Inc.*, supra at 786–787 (1st Cir. 1979). The issue before me is not whether Respondent's or Local 1095's interpretation of the contract was correct, but whether Respondent failed to fulfill its statutory bargaining obligation by refusing to furnish, upon request, information relevant to Local 1095's proper performance of its duties under the Act. *NLRB v. Acme Industrial Co.*, supra at 437. It is for this reason that I reject Respondent's contention that because of Judge Vukasin's interpretation of the governing collective-bargaining agreement, it was not obligated under the Act to furnish to Local 1095 the requested information herein.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act in January 1986 by refusing to furnish Local 1095 with the pay records of the salespersons it employed from November 1982 through January 1986 and having found that Respondent violated Section 8(a)(5) and (1) in January 1988 by refusing to furnish Local 1095 with the pay records of the salespersons it employed from July 1983 to January 12, 1988, I would normally, in addition to remedying these violations of the Act by ordering Respondent not to engage in similar conduct in the future, affirmatively order Respondent to furnish the requested information to Local 1095. However, in view of the unusual circumstances of this case I do not believe such a remedy would effectuate the policies of the Act. For, as I have found supra, if Judge Vukasin's order vacating the backpay awards of Arbitrators Eaton and Draznin are affirmed by the Court of Appeals for the Ninth Circuit, the above-described information requested by Local 1095 on January 22, 1986, and January 12, 1988, would be without any possible relevance to Local 1095 in evaluating the grievants' backpay claims. Under the circumstances, I shall not recommend, as a part of the remedial order in this case, that Respondent furnish this information to Local 1095, but instead shall recommend that jurisdiction over the allegations concerning Respondent's unlawful refusal to furnish the information requested in the letters to Respondent dated January 22, 1986, and January 12, 1988, be retained for the limited purpose of entertaining an appropriate and timely motion for further consideration of the ap-

[39] In the case of Fontes' grievance, it was Judge Vukasin who confirmed the arbitrator's reinstatement award and who ordered that a different arbitrator consider the matter for purposes of determining Respondent's backpay liability. Therefore, the arbitrator who decides Fontes' backpay claim will be governed by Judge Vukasin's interpretation of the collective-bargaining agreement.

[40] That Local 1095's interpretation of the agreement was not frivolous or unreasonable is demonstrated by the fact that the two arbitrators who have considered the matter, agreed with its interpretation.

propriate remedy for this violation of the Act on a proper showing that the Court of Appeals for the Ninth Circuit has sustained Local 1095's appeals of the orders issued by Judge J.P. Vukasin Jr. in Case C88-0520 on May 15, 1989, and Case C88-3731 on October 30, 1989.

F. *The Alleged Violation of Section 102.119 of the Board's Rules and Regulations*

Section 102.119 of the Board's Rules and Regulations entitled, ''Prohibition of practice before Board of its former Regional employees in Cases pending in Region before employment,'' reads as follows:

> No person who has been an employee of the Board and attached to any of its Regional Offices shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any Regional Office to which he was attached during the time of his employment with the Board.

Toward the end of the second day of the hearing in this case, which lasted 3 days, counsel for the Charging Party learned that Attorney Nancy Watson-Tansey, who had been assisting Respondent's Attorney John Bobay in his representation of Respondent in connection with the instant unfair labor practice proceeding, while employed by the Board as an attorney assigned to its Regional Office for Region 20, had been temporarily assigned to Region 32 for 3 months in 1987, during which time several of the charges involved in this case were pending before that Regional Office. In view of this, counsel for the Charging Party took the position that by assisting Respondent's Attorney in this proceeding, attorney Watson-Tansey had engaged in conduct which violated Section 102.119 of the Board's Rules and Regulations and that because of this Respondent's Attorney John Bobay should be disqualified from continuing to represent Respondent. I refused to allow this matter to be litigated and it was not in fact litigated.

I rejected the Charging Party's request that Attorney Bobay be disqualified from representing Respondent. The reason for my ruling was that if in fact Attorney Watson-Tansey had violated Section 102.119 by assisting Attorney Bobay, the damage had already been done and Attorney Bobay's removal at this late date in the proceeding would not undue the damage, but would only further delay the Board's disposition of the instant unfair labor practice charges, which unfortunately had already been delayed for several years.[41]

Counsel for the General Counsel did not join in the Charging Party's request that, as the result of Attorney Watson-Tansey's assistance, Attorney Bobay be disqualified from continuing to represent Respondent. However, in her posthearing brief, counsel for the General Counsel takes the position that I should find that by assisting Attorney Bobay, in connection with this proceeding, that Attorney Watson-Tansey violated Section 102.119 of the Board's Rules and Regulations and to remedy this violation, I should recommend that the Board ''reprimand'' her. I disagree.

The question of whether Attorney Watson-Tansey has violated Section 102.119 has not been litigated. She has not been afforded an opportunity to defend herself against this charge. Under the circumstances it would be premature to conclude whether or not Section 102.119 has been violated by her assistance to Attorney Bobay in connection with this proceeding. I shall, however, recommend that the Board conduct an investigation into the General Counsel's and the Charging Party's allegations that Attorney Watson-Tansey violated Section 102.119 of the Board's Rules and Regulations by assisting Attorney Bobay in representing Respondent in connection with this proceeding.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally requiring its salespersons to pay more to Respondent for damaging the demonstrators they rented from Respondent, than the $250 limit set by Respondent's collective-bargaining agreement with Local 1095, and by unilaterally requiring its salespersons to pay $20 a month into an insurance fund, in violation of a provision in its collective-bargaining agreement with Local 1095 prohibiting any charges to salespersons other than a $50 a month rental fee.

2. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without affording Local 1095 an opportunity to bargain, changing its salespersons' existing terms and conditions of employment, as follows: requiring them to pay for damages, up to $500 per occurrence, incurred to company owned vehicles they were driving; requiring them to attend sales meetings on their scheduled days off; requiring them to work on Sundays; prohibiting them from shopping trade-ins; and discontinuing its policy of renting demonstrators to them.

3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish to Local 1095 the information requested in Local 1095's letters to Respondent dated January 22, 1986, September 16, 1987, and January 12, 1988.

4. On November 1, 1988, Local 1095 ceased to exist and merged into Local 1179 and, as of November 1, 1988, Local 1179 succeeded to Local 1095's October 17, 1988, certification by the Board as the exclusive collective-bargaining representative of all full-time and regular part-time employees engaged in the sales of new and used automobiles and trucks employed by Respondent at Toyota of Berkeley, excluding all employees covered by other collective-bargaining agreements, office clerical employees, guards' and supervisors as defined in the Act.

5. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 1179 as the

[41] If I had chosen to evaluate the Charging Party's request on its merits, the following would have occurred. In the interest of due process, I would have recessed the hearing and granted Attorneys Watson-Tansey and Bobay a continuance so they would have an opportunity to fairly defend themselves against this new allegation of misconduct. Thereafter, after hearing the evidence, I would have then again recessed the hearing in order to decide whether the evidence established that by assisting Attorney Bobay, Attorney Watson-Tansey violated Sec. 102.119 of the Board's Rules and Regulations and, if so, whether an appropriate sanction for such a violation would be to disqualify Attorney Bobay from continuing to represent Respondent in this proceeding. If I reached that conclusion, I would then have again recessed the hearing so as to afford Respondent an opportunity to employ a new attorney.

exclusive bargaining representative of the employees in the aforesaid certified unit.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not otherwise violated the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend a remedial order requiring Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its employees' terms and conditions of employment in several different respects, I shall order Respondent to make whole the unit employees for any losses suffered as a result of its unlawful unilateral action, with interest thereon to be computed in the manner set forth in *New Horizons for the Retarded*.[42]

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally prohibiting its salespersons from shopping trade-ins, unilaterally discontinuing its policy of renting demonstrator motor vehicles to its salespersons, and by unilaterally instituting a policy requiring its salespersons to pay for damages, up to $500 per occurrence, incurred to company owned vehicles they were driving, I shall order Respondent, if requested by Local 1179, to reinstitute the terms and conditions of employment that existed before those particular unlawful unilateral changes.[43]

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 1179, I shall recommend that it cease and desist and to bargain on request with Local 1179 and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, I shall recommend that the initial period of the certification be construed as beginning the date the Respondent begins to bargain in good faith with Local 1179. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

The Respondent, Southwick Group d/b/a Toyota of Berkeley, Berkeley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with United Food and Commercial Workers Union, Local 1179, Automobile Sales Division, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish Local 1179 with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, and unilaterally changing the terms and conditions of employment of the employees in the bargaining unit without bargaining with Local 1179.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Local 1179 as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees engaged in the sales of new and used automobiles and trucks employed by Toyota of Berkeley at its Berkeley, California facility; excluding all employees covered by other collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

(b) On request, furnish Local 1179 with the information sought in its attorney's letter to Respondent dated September 16, 1987.

(c) On request, reinstate the terms and conditions of employment that existed before it unilaterally prohibited the unit employees from shopping trade-ins, unilaterally discontinued its policy of renting demonstrator motor vehicles to the unit employees, and unilaterally instituted a policy requiring the unit employees to pay for damages, up to $500 per occurrence, incurred to company owned vehicles they were driving, and make whole the unit employees for any losses they may have suffered as the result of these and the other illegal unilateral changes found in this decision, with interest.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other record necessary to analyze the amount of backpay due under the terms of this Order.

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[42] 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[43] All of the above-described unilateral changes occurred, as found supra, subsequent to the February 22, 1984 representation election during which period Respondent acted at its peril in making unilateral changes in its employees' terms and conditions of employment. The remainder of the illegal unilateral changes found in this decision, as I have found supra, occurred prior to Respondent's December 13, 1983 lawful withdrawal of recognition. I therefore have not recommended that those illegal unilateral changes be rescinded upon request. Likewise, any possible backpay liability incurred by Respondent for its unilateral conduct found herein, which occurred prior to its December 13, 1983 withdrawal of recognition, would be tolled as of December 13, 1983.

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Post at its facility in Berkeley, California, copies of the attached notice marked ''Appendix.''[45] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

IT IS FURTHER ORDERED that jurisdiction over the allegations concerning Respondent's unlawful refusal to furnish the information requested in the letters to Respondent dated January 22, 1986, and January 12, 1988, be retained for the limited purpose of entertaining an appropriate and timely motion for further consideration of the appropriate remedy for this violation of the Act on a proper showing that the Court of Appeals for the Ninth Circuit has sustained Local 1095's appeals of the orders issued by Judge J. P. Vukasin Jr. in Case C88-0520 on May 15, 1989, and Case C88-3731 on October 30, 1989.

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with United Food and Commercial Workers Union, Local 1179, Automobile Sales Division, as the exclusive bargaining representative of the employees in the bargaining unit, and refuse to furnish Local 1179 with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, and unilaterally change the terms and conditions of employment of the employees in the bargaining unit without bargaining with Local 1179.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Local 1179 as the exclusive representative of the employees in the appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time employees engaged in the sales of new and used automobiles and trucks employed by Toyota of Berkeley at its Berkeley, California facility; excluding all employees covered by other collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

WE WILL, on request, furnish Local 1179 with the information sought in its attorney's letter to us dated September 16, 1987.

WE WILL, on request, reinstate the terms and conditions of employment that existed before we unilaterally prohibited the unit employees from shopping trade-ins, unilaterally discontinued our policy of renting demonstrator motor vehicles to the unit employees, and unilaterally instituted a policy requiring the unit employees to pay for damages, up to $500 per occurrence, incurred to company owned vehicles they were driving.

WE WILL make whole the unit employees for any losses they may have suffered as a result of the above-described and the other unlawful unilateral changes found in this proceeding, with interest.

SOUTHWICK GROUP D/B/A TOYOTA OF BERKELEY